STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	)	
	)	
	)	**04-0461**
Petition Regarding Compliance with the Requirements Docket No. of Section 13-505.1 of the Public Utilities Act	)	

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S REPLY BRIEF

Matthew L. Harvey
Eric M. Madiar
Michael J. Lannon
Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
312 / 793-2877

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Counsel for the Staff of the
Illinois Commerce Commission

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STAFF OF THE ILLINOIS COMMERCE COMMISSION'S INITIAL BRIEF

The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, pursuant to Section 200.800 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Initial Brief in the above-captioned matter.

I. INTRODUCTION

The Staff of the Illinois Commerce Commission's ("Staff") positions and recommendations on imputation issues in this proceeding are conservative and entirely consistent with the Commission's resolution of similar issues in past imputation proceedings. *See* Staff IB at 20-28, 35-36. The Staff recommends that the Commission resolve imputation issues in this proceeding in a like manner as it has resolved similar issues in past imputation proceedings, and seeks only to preserve the status quo in its competitive business NAL markets.

Illinois Bell Telephone's ("SBC" or "SBC Illinois" or the "company") and the Citizens Utility Board's ("CUB") positions, on the other hand, urge the Commission to embark upon a more adventurous course. As the first line of defense of their novel positions, SBC and CUB argue that no imputation test is needed as a result of the UNE

loop rate increases in ICC Docket 02-0864. In order to make such a showing, SBC and CUB argue that UNEs are not "services" or "service elements" under Section 13-505.1 and, thus, there is no need for UNEs to be imputed to retail rates. SBC IB at 3; CUB IB at 4. As a second line of defense, SBC and CUB argue that business network access lines ("NALs") should not be treated as a stand-alone service under Section 13-505.1. SBC and CUB argue that the "service" should be defined to include the business NAL *plus* other products that *may* accompany the NAL, such as usage and features. SBC IB at 3-4; CUB IB at 4-5.

If the Commission does not accept their threshold argument that imputation is not needed, which position Staff demonstrates warrants rejection, SBC and CUB insist that whatever imputation test is required, it should not hinder their pricing flexibility. In order for the Commission to adopt their positions, SBC and CUB propose that the Commission disregard Section 13-505.1's plain language and legislative purpose, and abandon its past precedent requiring that *each* stand-alone service pass imputation and, instead, adopt a self-described "broad" imputation test.[1] The Commission has never adopted such a novel broad test before. In the Staff's view, moreover, the SBC and CUB proposal is far *too* broad. SBC's and CUB's broad imputation test scenarios would aggregate revenue, among other things, from disparate revenue streams in order for SBC's business NAL to pass imputation. Staff views SBC's and CUB's proposed broad test scenarios as inappropriate as they would certainly eviscerate the imputation protections contained in both the PUA and in the Commission's rules against price

[1] In Staff's view, SBC's two broad test scenarios have primarily the same flaw -- the inclusion of revenue for usage, features, and switched access services. The sections of Staff's reply brief addressing the inclusion of usage, features, and switched access are not specific to either broad test scenario. The only distinction between the two broad test scenarios is in how they address the port cost issue (LRSIC vs. UNE). Regardless of the port cost issue, the inclusion of usage, features, and switched access revenues guarantee that the results are the same under either scenario.

squeezes in certain Illinois telecommunication markets. The Staff recommends that the Commission reject SBC's and CUB's novel tests and, instead, keep to the steady course this Commission has so far charted in order to protect Illinois telecommunication markets against price squeezes.

II. HOW TO DEFINE THE "SERVICE" SUBJECT TO IMPUTATION IN THIS PROCEEDING

A. SBC ILLINOIS' ARGUMENT THAT ITS NALS ARE NOT SUBJECT TO IMPUTATION ON A STAND-ALONE BASIS IS UNSUPPORTED BY SECTION 13-505.1'S PLAIN LANGUAGE, COMMISSION IMPUTATION RULES, AND PAST COMMISSION DECISIONS

SBC Illinois[2] advances several unconvincing arguments to support its proposition that its business NAL is not a stand-alone service under Section 13-505.1 but, rather, should be considered on an overall basis with other associated competitive services. *See* SBC Illinois Brief, at 4, 5-12. Each of these arguments is discussed below.

1. Section 13-505.1 and Article XIII are very helpful in determining what constitutes a "service" for imputation purposes.

SBC Illinois claims that neither Section 13-505.1, nor Article XIII's definitions, is helpful in defining what constitutes a "service" for imputation purposes. SBC Illinois Initial Brief, at 6-7. To the contrary, both provisions are of the utmost use in making such a determination in this proceeding as Staff explained in its Initial Brief. *See* Staff Initial Brief, at 13-16.

To summarize, Section 13-505.1 is completely unambiguous in at least three respects. First, the statute requires "each" of SBC Illinois' "competitive services" to pass imputation where the company provides competing carriers with "noncompetitive

[2] Staff notes that CUB makes essentially the same arguments as SBC Illinois that the company's NALs are not a "service" subject to imputation on a stand-alone basis. Staff's Brief recounts and refutes each of these arguments. To the extent Staff's Brief only references SBC Illinois in no way constitutes a waiver on Staff's part to refute CUB's identical, but abridged arguments.

services or noncompetitive service elements" that competing carriers need to use as inputs to provide the same competitive service as SBC Illinois. *Id.* at 13-14 *quoting* 220 ILCS 5/130505.1(a). Second, the statute's imputation test ensures that SBC Illinois' retail rate "for each [competitive] service" at issue meets or exceeds the costs of service faced by competing carriers to provide the same service as SBC Illinois. *Id.* at 14. Last, the statute's silence as to revenues competitive carriers *might obtain* by offering the same competitive service as SBC Illinois or from other associated, but separate, competitive services indicates that it would be improper for the Commission to consider them in formulating any imputation test for a specific competitive service. *Id.* at 15-16. In sum, then, the plain language of Section 13-505.1 requires the Commission to analyze each of SBC Illinois' competitive services on a stand-alone basis without factoring in (or commingling) revenues from *other* competitive services that may be in some way associated with the competitive service that is subject to imputation.

Section 13-502.5 of the PUA further clarifies Section 13-505.1's mandate, to the extent any clarification is needed, by delineating that SBC Illinois' usage and vertical services are each separate and distinct competitive services when provided to business end users. *Id.* at 15-16 *citing* and *quoting* 220 ILCS 5/13-502.5(b), 13-502.5(c).

Further, Code Part 792 of the Commission's rules, which implements Section 13-505.1, make clear that Article XIII's definition of "telecommunications service" is, contrary to SBC's suggestions, neither "unhelpful" nor "circular" for purposes of determining what is subject to imputation. 83 Ill. Admin. Code § 792.20. Commission rule 792.20 states that a "telecommunications service" as defined in Section 13-203 of the PUA is a "service" subject to imputation if it meets the description set forth in Section 13-505.1. *Id.* Put differently, an incumbent carrier's *telecommunications*

service is subject to imputation when all of the following are met: (1) the service is either a competitive service, switched interexchange service or interexchange service private line services; (2) the incumbent carrier uses its own noncompetitive services or noncompetitive services elements to provide that competitive service; and (3) the incumbent carrier makes those same noncompetitive services or noncompetitive service elements available to competitive carriers so they can provide the same competitive service as the incumbent carrier.

A simple application of Part 792 to the facts of this proceeding reveals that SBC Illinois retail business NAL is subject to imputation on a stand-alone basis. The company itself admits (in light of the provisions of Section 13-502.5 of the Public Utilities Act, it can scarcely do otherwise) that its retail business NAL is a competitive service, and that service is available to business end users on a stand-alone basis.[3] Further, as Staff pointed out in its Initial Brief, SBC Illinois conceded in both the Commission's *2002 Code Part 792* proceeding and in response to Staff Data Request 1.11 that its loops and ports are two of the three necessary parts that comprise its competitive offering of the retail business NAL. Staff Initial Brief, at 34. Finally, SBC Illinois concedes--as, again, it must--that it makes its unbundled loops and ports available to competitive carriers as UNEs. SBC Initial Brief at 9, 13. In sum, SBC Illinois is mistaken that Section 13-505.1 and Article XIII are "unhelpful", either on their own or as implemented by the Commission's imputation rules.[4]

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[3] *See* SBC Illinois Initial Brief, at 6 (stating that all of the company's services provided to business customers are subject to imputation); *Id.* at 10 ("acknowledge[ing] that customers can purchase network access lines even if they have no intention of making or receiving any calls and that the network access line will remain functional even if idle."); *see also* 220 ILCS 5/13-502.5(b) (all business services declared competitive).

[4] *See Springwood Assoc. v. Health Facilities Planning Bd.*, 269 Ill. App. 3d 944, 948 (4th Dist. 1995) ("[A]dministrative agencies must follow their own rules as written, without making ad hoc exceptions or departures therefrom in adjudicating").

2. SBC Illinois' legislative intent argument is improper, and is contrary to Section 13-505.1's plain language and past Commission decisions.

SBC Illinois also postulates -- without citation to any authority -- that the imputation statute "was not drafted with the network access line in mind" but, rather, "was primarily focused on interexchange, switched services like local calling, and private line services" because they "were complete services." SBC Illinois Initial Brief, at 7. From that proposition, SBC Illinois deduces this since its "network access lines" are not a "complete service" its NALs simply do not fit the model the imputation test was enacted to embrace. *Id.* at 7. The company derives this conclusion despite the fact that it admits that business end users can purchase the NAL on a stand-alone basis, and only receive calls.[5]

SBC Illinois' assertion that the legislature intended to exempt its NALs from imputation on a stand-alone basis is absolutely incorrect, for several reasons. To begin with, SBC Illinois offers *no support* for its novel view of Section 13-505.1's legislative history, other than citing its own witness's unsupported testimony. *See* SBC Illinois Initial Brief, at 7 n.2 *citing* SBC Ill. Ex. 1.0 (Panfil Direct) at 15. As the Commission is well aware, expert witness testimony on statutory construction is not only *incompetent* as to statutory interpretation, but also is *improper* and should be stricken *even before an administrative agency*. *Dept. of Corrections v. Ill. Civil Service Comm'n*, 187 Ill. App. 3d 304, 307-08 (1st Dist. 1989) (reversing and remanding an agency decision in part because it both admitted and relied upon expert testimony as to statutory construction).

[5] *See* SBC Illinois Initial Brief, at 10 ("acknowledge[ing] that customers can purchase network access lines even if they have no intention of making or receiving any calls and *that the network access line will remain functional even if idle*.") (emphasis added).

Accordingly, Staff recommends that the Commission disregard SBC Illinois' argument for this reason alone.

Even on the merits, however, SBC Illinois' proposition is contrary to the plain language of Section 13-505.1. Section 13-505.1 not only subjects an incumbent carrier's "interexchange service" and "interexchange service private line services" to imputation, but also "*each*" of its "*competitive services*." 220 ILCS 5/13-505.1 (emphasis added). To accept SBC Illinois' interpretation would require the Commission to read the terms "each" and "competitive service" out of the statute, which, of course, it cannot do. *Primeco Personal Communs. v. Ill. Commerce Comm'n*, 169 Ill.2d 70, 91 (Ill. 2001) (a statute must be construed "so that no term is rendered superfluous or meaningless.").[6]

Moreover, SBC Illinois' attempt to argue that Section 13-505.1 does not apply to its retail business NAL on a stand-alone basis is unavailing due to past Commission decisions. SBC Illinois questions the application of Section 13-505.1 to its NALs merely because it asserts that: (1) its NALs are not a "complete service" subject to imputation (whatever that might be); or (2) its NALs cannot be neatly separated from usage, vertical features, and switched access since a UNE port supports both its NALs and those other named competitive services. *See* SBC Illinois Initial Brief at 4, 7-10. The Commission has rejected both of these resurrected arguments in its past decisions.

[6] Even if one were to assume *arguendo* that the legislature did not contemplate subjecting the company's retail business NAL to imputation on a stand-alone basis, that fact alone does not render Section 13-505.1 in any way less applicable to these circumstances. The Illinois Supreme Court has long since rejected the proposition, advanced by SBC Illinois here, that the scope of a statutory provision is confined to only those circumstances specifically contemplated by lawmakers. *McDaniel v. Bullard*, 34 Ill. 2d 487, 491 (Ill. 1966). In its *McDaniel* decision, the Illinois Supreme Court held that a statutory provision is fully applicable to situations not initially contemplated by the legislature when (1) the statute is prospective in operation, (2) is phrased in terms comprehensive to cover new situations, and (3) the application of the statute to the new situation would be consistent with the statute's legislative purpose. *Id.* Without question, Section 13-505.1 meets each of the attributes set forth by the *McDaniel* court.

In 1995, in its *Customers First Order*, the Commission rejected SBC Illinois argument that it had no authority to subject the company's NALs to imputation because that service was not explicitly listed in Section 13-505.1.[7] The Commission held that it had the discretion to subject SBC Illinois' NAL to imputation as a stand-alone service even though the statute and the Commission's imputation rules did not specifically mention NALs. *Id.* at *111-*112. The Commission adopted Staff's position, and concluded that the company's NAL were subject to Staff's "sum-of-the-parts" imputation test *even though* SBC Illinois' NAL were not yet classified as a "competitive service." *Id.* at *126-*127.

A year later, in its *Customers First Compliance Order*, the Commission concluded SBC Illinois' UNE port functionality was a "separate element" and severable from the switch and other switch functions, such as usage and vertical services.[8] Ameritech witness Eric Panfil testified that "it was crucial [for the Commission] to recognize that the customer interface on the switch (i.e., the 'port' and all the functionality of the switch) are inseparable" from a network access line. *Id.* at *5-*6. Mr. Panfil further testified that it would be appropriate for the company to price its ports at zero. *Id.* at *7. Staff and intervenors took positions in opposition to SBC Illinois,[9] and clarified that a "port is the basic non-usage sensitive service which gives the customer access to other switching services." *Id.* at *11 (Commission summary of the testimony

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[7] *Illinois Bell Telephone Company: Proposed introduction of a trial of Ameritech's Customers First Plan in Illinois et al.*, Docket Nos. 94-0096, 94-0117, 94-0146, 94-0301 (cons.), 1995 Ill PUC LEXIS 230, at *110-*111 (Order entered April 7, 1995) ("*Customers First Order*").

[8] *Illinois Commerce Commission, on its own motion v. Illinois Bell Telephone Company: Citation to investigate Illinois Bell Telephone Company's rates, rules, and regulations for its Unbundled Network Component elements, Local Transport Facilities, and End Office Integration Services*, ICC Docket No. 95-0296, 1996 Ill. PUC LEXIS 493, at *5-*17 (Order entered Oct. 9, 1996) ("*Customers First Compliance Order*").

[9] *Id.* at *17 (Commission noting that "Intervenors and Staff have similar positions on this issue.").

AT&T witness, Ms. Cathleen Conway). Staff and intervenors also noted, as captured by AT&T's witness, that:

> *Switching services are additional services which the customer purchases on a usage-sensitive basis. Thus, the Company is not capable of knowing when an end user will choose to purchase some other switching services in addition to the port. Indeed, a customer may purchase a port and only receive calls, thus never purchasing other switched services—demonstrating that the port is in fact a distinct service.* [SBC Illinois] consistently distinguished between the usage and non-usage sensitive services and costs of the switch and port until the Commission adopted the Pricing Rule in [its *Customers First Order*].
>
> *Id.* at *11 (emphasis added).

From the above, and other testimony, the Commission concluded that Staff's and intervenors' view was "compelling and that zero port pricing [was] contrary to [its *Customers First Order*]." *Id.* at *17. In addition, the Commission concluded that "[a] port is a separate element" from the switch and other switch functions. *Id.* In sum, SBC Illinois' misguided, and utterly unsupported, argument that the General Assembly intended to exclude its NALs from stand-alone imputation is improper, simply wrong, and contrary to Section 13-505.1's plain language and past Commission decisions.

3. SBC Illinois' mischaracterization of Staff's position only succeeds in further undermining the company's theory.

Finally, SBC Illinois claims it is Staff's position that imputation is required for every competitively tariffed service that can "function on a stand alone basis," and for every "unique rate" offered in SBC Illinois' tariffs. SBC Illinois Initial Brief, at 10-11. The company then knocks down its newly created straw man by arguing that since the term "stand alone" nowhere appears in connection with the word "service" in the statute, the statute cannot be said to subject "every product which can 'function on a stand alone basis'" to imputation. *Id.* Further, the company asserts that nothing in the statute

requires imputation "for every unique rate" offered in its tariff, nor have such tests ever been performed. *Id.*

SBC's argument is without merit. To set the record straight, SBC Illinois' characterization of Staff's position is, as noted above, simply incorrect and misleading. It is Staff's view that an incumbent carrier's competitive service is subject to imputation on a stand-alone basis because the statute explicitly states that "*each of [an ILEC's] own competitive services*" is subject to imputation (provided, of course, other criteria are met). 220 ILCS 5/13-505.1(a) (emphasis added). The word "each" is defined in relevant part as "every one of two or more persons or things composing the whole, *separately considered*." *Orr v. Edgar*, 283 Ill. App. 3d 1088, 1096 (1st Dist. 1996) (emphasis added). Thus, when the General Assembly specified "each" of an incumbent carrier's "competitive services" is subject to imputation, it intended for a particular competitive service to be considered separately based on the provision's main goal of preventing a price squeeze.

Further, it is Staff's position that a competitive service is only subject to imputation on a stand-alone basis if *all* of the following are met:

- The incumbent carrier uses its own noncompetitive services or noncompetitive service elements to provide that stand alone competitive service;[10]

- The incumbent carrier makes those same noncompetitive service inputs available to competitive carriers so they can provide the same competitive service as the incumbent carrier;[11]

- The incumbent carrier has increased its tariffed rates for those noncompetitive service inputs that competitive carriers must purchase from the incumbent carrier.[12]

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[10] *See* Staff Initial Brief, at 13 *citing* and *quoting* 220 ILCS 5/13-505.1(a); 83 Ill. Admin. Code § 792.10.

[11] *Id.*

[12] Staff Ex. 1.0, at 6; 83 Ill. Admin. Code § 792.30 (c)(3).

In other words, SBC Illinois' characterization of Staff's position is far off the mark. Consequently, it is absurd for SBC Illinois to contend that Staff believes that imputation tests must be performed for every unique rate element contained in the company's tariffs.

B. SBC ILLINOIS' DESCRIPTION OF THE "PRICE SQUEEZE" BARRED BY SECTION 13-505.1 IS WRONG

Aside from attacking Section 13-505.1 and Article XIII as "unhelpful" and "circular," SBC Illinois attempts to re-define what constitutes a "price squeeze" for imputation purposes. *See* SBC Illinois Initial Brief, at 6-10. The company does this as yet another way to improperly include revenues from other competitive services, such as usage, vertical services, and switched access services, into the narrow imputation test the Commission must perform in this proceeding. The company asserts – again, without citation to any authority - that: "the purpose of a price squeeze test [under the statute] is to promote competitive '*fairness*.'" SBC Illinois Initial Brief, at 8 (emphasis added). From this, SBC Illinois fabricates, from whole cloth, the proposition – again, unsupported by any authority -- that the Commission is "require[d], or at least permit[ted],…to evaluate the scope of the 'service' subject to imputation in a policy context so as to promote 'fairness'—for both the incumbent provider and the competitor." *Id.* Further, the company alleges that is it Staff's view—which it is not—that the purpose of imputation testing is to "protect individual customers or small groups of customers." *Id.* at 14.

SBC Illinois' proposition is absurd. The imputation statute's purpose is to *prevent and eliminate* a "price squeeze," not construct a "price squeeze" arrangement that, in SBC Illinois' words, "promotes fairness" to "both the incumbent provider and the

competitor." The only "fairness" aspect of Section 13-505.1 – "fairness" is a word nowhere to be found in the statute - is its mandate to create a level playing field for competitive carriers because of SBC Illinois' monopoly control of bottleneck facilities at issue in this proceeding. *See 2002 Code Part 792 Order*, at *7, ¶ 10 (summarizing Staff's position).

Staff explained in detail Section 13-505.1's bar against a price squeeze in its Initial Brief and need not be repeat that discussion here. *See* Staff Initial Brief, at 13-29. SBC Illinois' dubious attempt to undermine and distinguish the Commission's *MCI Complaint Order*, however, warrants examination. *See* SBC Illinois Initial Brief, at 11-12.

SBC Illinois contends that the Commission's order is distinguishable on its facts, and only "stands for the proposition that separately priced calling plans" are subject to imputation. *Id.* at 12. Also, the company states that the order "does not address the unique situation here where the network access line is [purportedly] not a stand-alone purchasing decision." *Id.* (Again, Staff has demonstrated that SBC Illinois' own admissions in this proceeding demonstrate the falsity of this assertion. See supra, at ??.)

While SBC Illinois is correct that the Commission did "not address" whether its NALs are subject to imputation, the Commission, in the *MCI Complaint Order*, stated two guiding principles relevant to this proceeding.[13] First, the Commission noted that, as a general rule, the greater the aggregation of service offerings, the greater the chance that an incumbent carrier can engage in a price squeeze and defeat imputation's legislative purpose. *MCI Complaint Order*, at *30. Second, the

[13] *MCI Telecommunications Corp. and LDDS Communications, Inc. v. Illinois Bell Telephone Company: Complaint under Articles IX and XIII of the Illinois Public Utilities Act*, ICC Docket No. 93-0044, 1994 Ill. PUC LEXIS 417 (Order entered Oct. 5, 1994) ("*MCI Complaint Order*").

Commission made clear that, because of the first principle, the Commission must look *beyond* an incumbent carrier's self-description of the service at issue, and examine the offering on a *disaggregated*, case-by-case basis to prevent anticompetitive pricing and behavior. *See* i*d.* a*t* *31-*32 (Commission rejects SBC Illinois' broad definition of the term "service" for imputation purposes, which aggregated different service offerings, because the company simply looked to the offering's "functionality" and "neglect[ed] the potential for anticompetitive pricing and behavior."). It is these principles that SBC Illinois (and CUB) hope the Commission will ignore, which it ought not.

On at least two occasions after its *MCI Complaint Order*, the Commission reiterated and refined these principles in a manner that utterly debunks SBC Illinois and CUB's notion of the statute's price squeeze prohibition. In its *Customer First Order*, the Commission rejected then-Ameritech's reciprocal compensation proposal on imputation grounds, because the proposal would place competitive carriers from the outset in a "loss leader" position if they terminated local traffic on Ameritech's network. The Commission explained that for imputation purposes the issue is "not whether a new LEC ultimately can scrape together revenues from enough sources to be able to afford Illinois Bell's switched access charges." *Customers First Order*, at *209-*210.

Instead, the Commission determined, the "crucial issue is the effect of a given reciprocal compensation proposal on competition", and whether competition is "viable" for competitive carriers at that level when competing against an incumbent carrier. *Id.* Put differently, the purpose of imputation is to evaluate whether competitors are placed in a loss leader position at the individual service level when they must use an incumbent carrier's noncompetitive service inputs to provide the same competitive service as the incumbent carrier. The Commission concluded that Ameritech's proposal was "not just

or reasonable" because it would force new LECs to adopt either a premium pricing strategy or use local calling as a "loss leader." *Id.*

In addition, the Commission rejected Ameritech's "business entry" analysis, which was prepared by its witness. Eric Panfil. *Id.* at *203-*204. That analysis—like Mr. Panfil's analysis in this proceeding—posited that competitors could profitably enter the local exchange market despite paying Ameritech's unreasonably high switched access rates because those carriers can "offer[] a broad array of services" to offset high access rates. *Id.* at *204. The Commission found Mr. Panfil's analysis to be "fundamentally flawed" in part because "[i]ntuitively, it is questionable whether it is prudent to permit an incumbent LEC to demonstrate the reasonableness of its rates with reference to its own conceptualization of the services a competing new entrant would offer." *Id.* Mr. Panfil's analysis is equally flawed here, and the Commission should give it equally short shrift.

In 1996, in response to the FCC's Notice of Proposed Rulemaking that later resulted in the *First Report and Order*, the Commission reiterated in its comments the above description of the imputation statute's price squeeze prohibition.[14] The Commission made these comments in response to the FCC's request for comments on the scope of state imputation rules. *Id.* The Commission's FCC comments are discussed in more detail below.

* * *

Before leaving this issue, Staff notes that its position on the Section 13-505.1 price squeeze prohibition should not come as a surprise to SBC Illinois, because it mirrors the position Staff took in the Commission's *2002 Code Part 792* proceeding. In that proceeding, SBC Illinois stated that the purpose of imputation tests is to "*prevent*

[14] *See* Comments of the Illinois Commerce Commission, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, at 56-59 (filed May 16, 1996) ("*ICC Comments*") (attached herein as "Staff Attachment B").

price squeezes" not permit them. *2002 Code Par 792 Order*, at *25-*26 (emphasis added). SBC Illinois further explained that a "price squeeze may occur when a carrier provides both a competitive service to end users, and provides a noncompetitive service or service element that is a necessary input to the competitive service to both itself and an equally efficient competitor." *Id.* at *25-*27. SBC Illinois continued with, "a price squeeze occurs if the first firm [the incumbent carrier] chooses to increase rates in the noncompetitive service or service element to the point where it becomes unprofitable for the second firm [a competitive carrier] to provide the competitive service, since the rates for the noncompetitive service or service element are a cost to the second firm." *Id.* The company concluded that "if the rate for the noncompetitive service is greater than [the first firm's] cost, it is possible for the first firm to engage in a price squeeze by dropping the rates on its competitive services without subsidizing the competitive services." *Id.*

SBC Illinois' above description is not the only type of "price squeeze" scenario Staff and Joint CLECs addressed, but it is also the type of price squeeze that the Commission must prevent in this proceeding. SBC Illinois' provides a competitive service to business end users—NALs—that is comprised of necessary noncompetitive inputs—unbundled loops and ports—that are utilized by SBC Illinois and competitive carriers to provide the same competitive service - indeed, in competition with one another. In the *UNE Loop Order*, the Commission approved SBC Illinois' request to increase its rates for those necessary noncompetitive inputs that competitive carriers depend upon. Since SBC Illinois' TELRIC-based rates for those necessary noncompetitive inputs is now greater than the company's LRSIC for the same inputs, SBC Illinois can engage in a price squeeze by simply maintaining its current retail rates

for its competitive NALs. The Commission's task, consequently, is to eliminate that price squeeze.

In short, SBC Illinois' attempt to redefine Section 13-505.1's price squeeze prohibition is both unsurprising and disingenuous. As the Commission cogently observed in a similar context, "[a]pparently, a prize squeeze is the flip side of arbitrage."[15] And, the Commission likewise observed, "depend[ing] upon whose ox is being gored," the benefiting party—in this case, SBC Illinois—will claim ignorance as to the existence of a price squeeze. *Id.* SBC Illinois conduct here fulfills this prophecy by relying upon FCC price squeeze analyses from that agency's Section 271 decisions. *See* SBC Illinois Initial Brief, at 8-9 n. 3, 15. As revealed below, the company's appeal to those decisions is also misplaced and simply a thinly-veiled attempt to misdirect the Commission from its mission to eliminate SBC Illinois' ability to price squeeze competitive carriers.

C. SBC ILLINOIS' RELIANCE UPON FCC "PRICE SQUEEZE" DECISIONS IS INAPPOSITE

SBC Illinois relies upon three FCC Section 271 decisions to support its erroneous view that the Commission's price squeeze analysis in this proceeding can consider revenues from other competitive services. *See* SBC Illinois Initial Brief, at 8-9 n. 3, 15. The company's reliance on those decisions is misplaced for several reasons. First, the Commission's task is not to implement federal law, but to administer its own statute—Section 13-505.1. Staff's previous discussion amply addresses the proper construction of the statute and need not be repeated here. *See supra*, § II A and B.

[15] *Second Interim Order*, Investigation into forward looking cost studies and rates of Ameritech Illinois for interconnection, network elements, transport and termination of traffic, ICC Docket Nos. 96-0486/96-0569 (consol.), 1998 Ill. PUC LEXIS 109, at *205-*206 (Order entered Feb. 17, 1998) (hereafter "*First TELRIC Order*").

Second, even if the Commission were charged by the Illinois General Assembly to reconcile the state's imputation statute with federal law price squeeze concepts, and it was not, the FCC decisions themselves reveal how the agency's price squeeze analyses are entirely different from the type required under the PUA and are therefore irrelevant to price squeeze concerns under Section 13-505.1. The FCC performed its price squeeze analyses as part of its *overall* examination of whether to grant RBOCs long-distance authority under the federal act's "public interest" standard. See Order on Remand, *In re Joint Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Delaware and New Hampshire*, 17 FCC Rcd 18660, 18738-18739, ¶ 137 (Sept. 25, 2002) ("*Delaware/New Hampshire Order*") *citing* 47 U.S.C. § 271(d)(3)(C).

Under that standard, the FCC specifically considers not only competitive carriers' costs, but also their profit margins and revenues from *all* revenue sources, including resale.[16] The FCC considers these additional factors because the agency must make a *general* determination as to whether a relevant local exchange market is open to competition *irrespective* of the mode of entry chosen by competitive carriers. *See Delaware/New Hampshire Order*, at 18730-81740, 18746, ¶¶ 138-140, 155. In particular, the FCC's Section 271 price squeeze analysis sets out to determine "whether competitors are 'doomed to failure.'" *Id.* at 18743, ¶ 148.[17] If competitive carriers are not "doomed to failure," then the FCC concludes that an RBOC's entry into the long-

[16] *Id.* at 18742-18743, ¶¶ 145-147; Order on Remand, *In re Joint Application by SBC Communications Inc. et al for Provision of In-Region InterLATA Services in Kansas and Oklahoma*, 18 FCC Rcd 24474, at ¶ 20; Order on Remand, *In re Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region InterLATA Services in Massachusetts*, 19 FCC Rcd 2839, at ¶ 14 (2004).

[17] *See Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Vermont,* Memorandum Opinion and Order, 17 FCC Rcd 7625, 7662, ¶ 66 (2002) ("*Vermont Verizon Order*") (concluding that AT&T and WorldCom have not established the existence of a price squeeze because they have not shown that "the UNE pricing [at issue] *doom[s]* competitors to failure." (emphasis in the original).

distance marketplace would be in the *overall* "public interest." *Delaware/New Hampshire Order*, at 18750, ¶ 159.

In contrast, Section 13-505.1's "price squeeze" analysis is distinct and much narrower and more granular. In SBC Illinois' own words, the imputation statute is "an Illinois-specific response" to the issue of a "price squeeze." SBC Illinois Initial Brief, at 7. And, as the company admitted in 1998, the PUA's imputation requirements "are more stringent than an imputation test from [even] an economics perspective[.]"[18] As SBC Illinois further explained in the Commission's *2002 Code Part 792* proceeding, Section 13-505.1's "imputation tests use the rates, where appropriate, charged [by an incumbent carrier] to other carriers, to ensure that a carrier does not anticompetitively increase the price of a noncompetitive service *required and used by a competitor to provide competitive service* to give [the incumbent carrier] a competitive advantage in a downstream product." *2002 Code Part 792 Order*, at *25-*26, ¶ 36. In addition, SBC Illinois correctly observed that "imputation [under Section 13-505.1] prevents an ILEC from pricing a competitive service so low that an equally efficient provider, who must buy some components from an ILEC, cannot afford to match [the ILEC's] price." *Id.* at *26, ¶ 36.

In sum, SBC Illinois' own words show that the FCC's "doomed to failure" approach causes it to conduct a much broader price squeeze analysis that considers additional factors that cannot be included under the PUA. The only similarity then between the FCC's "price squeeze" analyses and those required under Section 13-505.1 is that they share the same name. As a result, SBC Illinois' misplaced reliance on

[18] *First TELRIC Order*, at *197.

the FCC's notion of a "price squeeze" must fail. Staff recommends that the Commission reject SBC Illinois' argument in its entirety.

D. SBC ILLINOIS' ARGUMENT THAT THE COMMISSION CANNOT ENGAGE IN "RATE-REBALANCING" USING TELRIC RATES IS FUNDAMENTALLY FLAWED

Finally, SBC Illinois asserts that the Commission would jettison "long-standing" policy if it were to require the company to include UNE loop and ports into the imputed cost of its retail business NAL at TELRIC, rather than LRSIC rates. SBC Illinois Initial Brief, at 13. The company also improperly contends that: "the FCC never intended that TELRIC rules dictate state retail rate structures." *Id.* In SBC Illinois' view, "[i]t would be more than a little perverse for the Commission to adopt an interpretation of state law that would impose federal costing and pricing constraints on its ratemaking authority that the FCC went out of its way to avoid." *Id.* at 14. As explained below, the company's argument is without merit.

To set the record straight, the FCC's *First Report and Order*,[19] to which SBC Illinois cites, make two points clear. First, the FCC elected *not* to establish its own *national* imputation requirement "to detect and prevent price squeezes." *Id.* at 15922, ¶ 848. Second, the FCC clarified that its decision not to establish such a *national* requirement should not be construed in any manner to hamper the authority of state commissions to implement state law imputation requirements and engage in rate rebalancing. *Id.* at 15922, ¶¶ 848-850.

In fact, the FCC concurred with state commission commentators, including this Commission, that there is "nothing in the 1996 Act [that] prohibits individual states from adopting imputation rules." *Id.* at 15922, ¶ 850. Further, the FCC concluded, "[w]hile [a

[19] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15918-15922, ¶¶ 839-850 (1996) ("*First Report and Order*").

national] imputation rule may be pro-competitive, we will leave the implementation of such rules to individual states." *Id. See id*. at 15499 n. 2002, ¶ 842 n. 2002 (recounting the comments of several state commissions, including this Commission, that "imputation issues should be left for decision by the states" and that the FCC should not adopt "imputation as a national standard.").

In short, the only thing "perverse" is SBC Illinois' suggestion that the FCC has admonished this Commission against engaging in "rate rebalancing" when the company's UNE rates for noncompetitive inputs for a competitive service exceed its retail rate for that service. Indeed, the Commission's FCC comments show that the Commission would not (and could not) tolerate such a scenario under Section 13-505.1. *ICC Comments*, at 56-59.

In the Commission's words, "competitors will be required to sell [a competitive] service[] as a 'loss leader,' hoping to make up the difference on other services." *Id.* at 56-57. The Commission then reiterated a portion of its *Customers First Order* where it rejected then-Ameritech's reciprocal compensation proposal on imputation grounds because the proposal would make the competitor a "loss leader" if it terminated local traffic on Ameritech's network. *Id.* The Commission explained that the proposal was anti-competitive and "not just or reasonable" because:

> The issue is not whether a new LEC ultimately can scrape together revenues from enough sources to be able to afford Illinois Bell's switched access charges. *The crucial issue is the effect of a given reciprocal compensation proposal on competition. Staff's analysis identifies the essential locus of competition between the incumbent LEC and the new LEC, and it is there that competition must be viable.* Illinois Bell surely could not argue that appreciable numbers of customers will switch exchange carriers because the new LEC offers the best directory assistance or custom calling in the area. *Yet, adoption of Illinois' Bell's proposal and rational would force new LECs to adopt either a premium*

> *pricing strategy or use local calling as a "loss leader." That is not just or reasonable.*
>
> *Id.* at 57 *quoting Customers First Order* at 98, 1995 Ill PUC LEXIS 230, at *209-*210 (emphasis added).

The Commission's above statement reinforces Staff's position that, for purposes of this proceeding, the "crucial issue" is whether it is "viable" for competitors to offer competitive business NALs against SBC Illinois without that service being a "loss leader" from the outset. SBC Illinois clearly would like the Commission to ignore the fact that its increased unbundled loops and ports rates have a "loss leader" effect on competitive carriers. Staff recommends that the Commission recognize SBC Illinois' position for what it is—anticompetitive and neither just nor reasonable.

Aside from misconstruing the FCC's *First Report and Order*, SBC Illinois' assertion that the Commission would jettison its "long-standing" policy if it were to require the company to include UNE loop and ports into the imputed cost of its NALs at TELRIC, rather than LRSIC rates ignores SBC Illinois' long-standing support for this position. SBC Illinois Initial Brief, at 13.

In the Commission's 1998 *First TELRIC* proceeding, the Commission established TELRIC rates for SBC Illinois' unbundled network elements, including its unbundled loops and ports, and considered the relationship between TELRIC rates for network elements and Section 13-505.1.[20] SBC Illinois argued that a proper imputation test of its network access lines would consist of, *inter alia*, the company's retail rate for its bundled NAL, "together with the TELRIC costs for a port, price of a loop, and a proportionate share of a service coordination fee[.]" *Id.* at *199.

[20] *See First TELRIC Order*, at *11-*16, *186-*207.

Moreover, SBC Illinois claimed that the Commission could not "direct [it] to lower the prices for its UNEs if a proper imputation test [were] not passed because the lowering of such a price would not permit [SBC Illinois] to cover the prescribed amounts of costs under the [federal] Act, including forward-looking shared and common costs." *Id.* at *200. As a remedy, SBC Illinois argued that "the Commission must permit [the company] to raise the price of [its] corresponding bundled, retail service." *Id.* Further, SBC Illinois (correctly) stated that allowing the company to raise its bundled retail rate was not only a "question" deferred by the FCC "to the states," but also "the type of 'rate rebalancing' envisioned by the FCC." *Id.* at *citing First Report and Order*, at ¶ 848.

Simply put, SBC Illinois' position in the Commission's *First TELRIC* proceeding speaks for itself and is, unsurprisingly, the mirror opposite of its position in this proceeding. Strangely enough, the company's former view, as expressed above, is much like that of Staff in this proceeding. Staff recommends that the Commission disregard SBC Illinois' position in this proceeding.

III. WHETHER UNES ARE "SERVICES" OR "SERVICE ELEMENTS" FOR PURPOSES OF THE IMPUTATION REQUIREMENT

A. OVERVIEW OF THE PARTIES' POSITIONS

As Staff noted in its Initial Brief, the Commission's determination as to whether SBC Illinois' UNEs are "noncompetitive services" or "noncompetitive service elements" for imputation purposes is a matter of statutory construction and Commission judgment. Staff Initial Brief, at 10, 29. Staff's Initial Brief set forth and applied those relevant rules of statutory construction and past Commission decisions, and drew two conclusions: (1) SBC Illinois' UNEs are "noncompetitive services" because the company's tariff

classification is dispositive for imputation purposes; and (2) SBC Illinois' UNEs are, at minimum, "noncompetitive service elements." *Id.* at 29-36.

Joint CLECs reached the same result as Staff, but through different means. *See* Joint CLECs Initial Brief, at 12-16. Rather than looking first to Section 13-505.1, Joint CLECs started with Article XIII's definition of "telecommunications services" and focused on the words "access and interconnection arrangements and services." *Id.* at 12. Joint CLECs maintain that when General Assembly added those words to Section 13-206 in 1997 through Public Act 90-0815, it manifested its intent "to include UNEs within the PUA's telecommunications definition" because UNEs "are, of course, interconnection arrangements and services offered by SBC to CLECs." *Id.* Next, Joint CLECs quote Section 13-505.1(a) and deduce that the statutory provision "encompasses UNEs provided by SBC to CLECs" because both CLECs and SBC Illinois rely upon those UNEs to provide the same competitive retail services (e.g., the local loop). *Id.* at 13.

Joint CLECs, however, do not state whether UNEs constitute either "noncompetitive services" or "noncompetitive service elements" under Section 13-505.1. In addition, they do not even discuss Section 13-216's definition of "network element," nor how that term squares with Section 13-203 (defining "telecommunication service"). Instead, Joint CLECs rely upon SBC Illinois' past practice of including UNEs in its imputation studies, and the irrefutable fact that without UNEs CLECs could not provide the same competitive service at issue in this proceeding. *Id.* at 13-16. At bottom, Joint CLECs argue that if the Commission were to declare that UNEs are not "noncompetitive services" or "noncompetitive service elements," the Commission would be acting contrary to both Section 13-505.1's plain language and legislative purpose. *Id.* at 14-15.

SBC Illinois and CUB, in contrast, rely exclusively upon the "telecommunications services"/"network elements" distinction for their claim that UNEs are neither "noncompetitive services" nor "noncompetitive service elements" for imputation purposes. *See* SBC Illinois Initial Brief, at 16-18; CUB Initial Brief, at 8-12. SBC Illinois and CUB both find support in the FCC's *federal law* determination that UNEs are not "telecommunications services," but "network elements." *Id.* While CUB relies exclusively upon the FCC's determination, SBC Illinois goes one step further and argues that this distinction also arises under the PUA based on the Article XIII's definitions for those terms, the Illinois Appellate Court's *Globalcom* decision, and the Commission's recent *Project Pronto* Order.[21] From these sources, SBC Illinois concludes that UNEs are not "noncompetitive services" under Section 13-505.1. SBC Illinois Initial Brief, at 17.

Similarly, the company asserts that "[i]f UNEs are not '[noncompetitive] services,' [then] they cannot be 'service elements' either." *Id.* SBC Illinois, however, fails to back up its assertion with anything other than circular reasoning as discussed below. *Id.* at 17-18. Finally, the company claims that Staff's tariffing argument is "irrelevant" because the company does not provide UNEs pursuant to tariff, but rather through interconnection agreements, and SBC Illinois will "at some point in time" withdraw its tariffs. *Id.* at 18.

In the discussion below, Staff refutes SBC Illinois and CUB's argument that UNEs are not "noncompetitive services" under Section 13-505.1. Staff demonstrates once again that SBC Illinois' tariff classification of its UNEs as "noncompetitive telecommunications services" is dispositive and qualifies them as "services" for

[21] *Compare* CUB Initial Brief, at 8-10 (relying only upon the FCC's First Report and Order) *with* SBC Illinois Initial Brief, at 16-17 (citing Section 13-216 of the PUA, *Globalcom v. Ill. Commerce Comm'n*, and the Commission's *Project Pronto Order*).

purposes of this proceeding. Further, Staff shows that when SBC Illinois provides UNEs to CLECs via interconnection agreement, those UNEs are deemed "telecommunications services" under Section 13-206, and, in turn, may qualify as "services" for imputation purposes. Finally, Staff debunks SBC Illinois' argument that UNEs are not "noncompetitive service elements" based on both the text and structure of Section 13-505.1 and the Article XIII and simple common sense.

B. UNEs QUALIFY AS "SERVICES" FOR IMPUTATION PURPOSES

Staff's Initial Brief demonstrated that UNEs qualify as "services" for imputation purposes based on the text, purpose, and structure of Section 13-505.1 and Article XIII of the PUA. See Staff Initial Brief, at 29-33. Staff explained that when the General Assembly used the term "noncompetitive services" in Section 13-505.1, it intended for that term to mean "noncompetitive telecommunications services," as defined in Section 13-210. *Id.* at 31. Staff further explained that SBC Illinois' competitive services were subject to imputation if that competitive service utilizes the same or functionally equivalent "noncompetitive telecommunications services" the company makes available to competitive carriers so they can provide the same competitive service. *Id.*

Staff concluded that since SBC Illinois' tariffs classified its UNE loops as a noncompetitive telecommunications service, that tariff classification was dispositive for purposes of this proceeding based on case law interpreting Section 13-502 and the Commission's *GTE North* imputation decision. *Id.* at 32.

To counter Staff's argument, SBC Illinois and CUB enlist resources beyond the company's tariff in support their claim that UNEs are not "noncompetitive services" for purposes of imputation. First among these is the FCC's conclusion that UNEs are

"network elements," not "telecommunication services." *See* SBC Illinois Brief, at 16-17; CUB Initial Brief, at 8-11. As Staff explained in its Initial Brief, the company and CUB's reliance on the FCC's *federal law* determinations are inapposite because, in this proceeding, the Commission is implementing *state law*, *not federal law*. Staff Initial Brief, at 33. And, given the unique context of this state law proceeding, those FCC decisions are neither binding nor relevant. *Id.* Staff believes its earlier refutation sufficiently disposes of SBC Illinois and CUB's argument.

In a similar vein, SBC Illinois argues that the same distinction exists under the PUA as evidenced by Article XIII's definitions for the terms "telecommunications services" and "network elements." SBC Illinois Initial Brief, at 16-17. In addition, the company points to the Illinois Appellate Court's *Globalcom* decision[22] and the Commission's recent *Project Pronto Order*,[23]which have both recognized that distinction. From these sources, SBC Illinois deduce that UNEs are not "noncompetitive services" because of the "telecommunications services"/"network elements" distinction. *Id.* As revealed below, SBC Illinois' reliance on the Article XIII's definitions and the above decisions is misplaced because the Commission cannot look beyond the unambiguous terms of SBC Illinois' tariff, which states that the company's unbundled loops are "non-competitive telecommunications services."

Staff's discussion below of the *Globalcom* decision illustrates Staff's argument. In *Globalcom*, the issue before the court was whether SBC Illinois properly charged Globalcom early termination fees when the CLEC converted special access circuits to EELs. 347 Ill. App. 3d at 601. SBC Illinois made the EELs available on an unbundled

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[22] *Globalcom v. Ill. Commerce Comm'n*, 347 Ill. App. 3d 592, 607-608 (1st Dist. 2004).

[23] *Illinois Bell Telephone Co.: Proposed Implementation of High Frequency Portion of the Loop (HFPL)/Line Sharing Service*, ICC Docket No. 00-0393, at 54 (Order entered Sept. 28, 2004) ("*Project Pronto Order*").

basis pursuant to Section 13-801(d)(3) under an "interim compliance tariff," which set forth the requisite rates, terms, and conditions to obtain EELs and other UNEs. *Id.* at 599-600.

SBC Illinois argued that the Globalcom triggered the fees because its conversion from special access circuit to EELs constituted a "termination of service" under the ILEC's "interim compliance tariff." Globalcom and the Commission, however, claimed that the conversion did not amount to a termination. Since SBC Illinois' tariff *did not* define "termination of service," the court looked to FCC's *First Report and Order* and Article XIII's definitions to resolve the ambiguity. *Id.* at 607-08. Based on the FCC's decision and Section 13-216, the court held that Globalcom's conversion to EELs was a "termination of service" under the tariff. *Id.* Accordingly, the court concluded that it was permissible for SBC Illinois to charge the CLEC early termination fees. *Id.*

Globalcom's facts demonstrate that it offers no guidance to the Commission in this proceeding because the court dealt with an ambiguous tariff term, which required the court to look *beyond* the tariff to other sources to resolve the matter. As the Illinois Supreme Court recently explained, "[a]lthough a utility tariff is not a legislative enactment, *its interpretation is governed by the rules of statutory construction*." *Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 64 (Ill. 2004) (emphasis added). Staff has already shown SBC Illinois' tariff is *unambiguous* in that it explicitly classifies the company's unbundled loops as "*non-competitive telecommunications services*."[24] As a result, SBC Illinois' reliance on the "telecommunications services"/"network elements" distinction is inapposite because the Commission in this proceeding is clearly confronted with an *unambiguous* tariff provision, and Illinois case law requires the

[24] Staff Initial Brief, at 32 citing *Ill. C. C. No. 20, Part 19, Section 2, 10th Revised Sheet No. 1* (SBC Illinois' tariff) ("*Loops*… *are non-competitive telecommunications services* which are offered in exchanges in Illinois as defined in Part 4, Section 1 of this Tariff.") (emphasis added).

Commission to interpret that tariff as plainly written. *Adams v. Northern Ill. Gas Co.*, 333 Ill. App. 3d 215, 223-24 (1st Dist. 2002) *aff'd* 211 Ill. 2d 32 (Ill. 2004).[25]

Similarly, SBC Illinois' citation to the Commission's *Project Pronto Order* does nothing to advance its cause because that proceeding was a reopened tariff proceeding, while this proceeding is opened pursuant to SBC Illinois' *Petition*. Compare Project Pronto Order, at 2-3 (detailing the docket's procedural history as a tariff proceeding initiated by SBC Illinois) *with* SBC Illinois Petition, at 1 (stating that its Petition was filed "in compliance with the Commission Order in Docket No. 02-0864," which is now a closed tariff proceeding). Simply put, the Commission's *Project Pronto Order* is limited to its circumstances because in that proceeding, by reopening the docket, the Commission had the statutory authority to enter an order to modify SBC Illinois' tariffs. In contrast, in this proceeding, the Commission is confined to the scope of SBC Illinois' *Petition*.[26] A review of SBC Illinois' Petition shows that at no point has the company requested a Commission investigation of its current tariff classification of its unbundled loops. Accordingly, the Commission has no such authority to modify or ignore the terms of SBC Illinois' tariffs. Moreover, it is Staff's position that SBC Illinois' attempts to undermine or down-play the effectiveness of its UNE loop tariff is tantamount to a collateral attack on the Commission's order in Docket No. 02-0864, which did not disturb that or any other tariff classification.

Finally, SBC Illinois contends that Staff's tariffing argument is "irrelevant" because the company provides CLECs with unbundled loops pursuant to

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[25] *See Adams*, 211 Ill. 2d at 57 (stating that "because the utility company drafts a tariff, it is generally accepted that language in a tariff, especially exculpatory language, is to be strictly construed against the utility company and in favor of the customer.").

[26] *In re: Investigation of the propriety of the rates, term, and conditions related to the provision of the Basic COPTS Port and the COPTs-Coin Line Port*, ICC Docket No. 01-0609, 2003 Ill. PUC. LEXIS 821, at *75-*76 (Order entered Oct. 22, 2003).

interconnection agreement, not tariff. SBC Illinois Initial Brief, at 18. SBC Illinois further asserts that its tariffs are merely temporary in light of the 7th Circuit Court of Appeal's *Bie* decision and that they will soon be withdrawn. *Id. citing Wisconsin Bell v. Bie*, 340 F.3d 441, 442-45 (7th Cir. 2003).

SBC Illinois' argument falls flat and asks too much of the Commission for several reasons. First, the *Bie* decision in no way absolves SBC Illinois of its state law obligation to file or honor its tariffs. The company's notion that it may withdraw its tariff is simply one of misdirection and a gross misreading of the case. At best, *Bie* stands for the proposition that state commissions cannot force incumbent carriers to file tariffs so that competitive carriers can purchase services *in lieu of* negotiating interconnection agreements with the incumbent carriers. *Bie*, 340 F.3d at 442-45. Put differently, the concern identified by the Seventh Circuit, *and the basis for preempting the state tariff provision at issue*, was the that the state tariff provision permitted a CLEC to obtain services from a tariff without going through the Section 252 negotiation process. In short, SBC Illinois' state law tariffing rights and duties, as Staff described in its Initial Brief, are fully effective as subsequent state and federal decisions make clear.[27] As a

[27] *See Ill. Bell Tele. Co. v. Ill. Commerce Comm'n*, 816 N.E.2d 379, 287 Ill. Dec. 617, 623-24 (3rd Dist. 2004) (upholding the Commission's authority to require SBC Illinois to make its Alt-Reg remedy plan available to competitive carriers with interconnection agreements, but not those CLECs without such agreements because it would conflict with federal law); *Michigan Bell Tele. Co. v. MCIMetro Access Transmission Serv.*, 323 F.3d 348, 358-60 (6th Cir. 2003) (upholding the Michigan PSC's authority to allow MCI to place resale orders via fax pursuant to tariff where the parties' interconnection agreement and Ameritech's tariff obligations "can co-exist and work in concert to promote local service competition"); *US West Communications Inc. v. Sprint Communications Co.*, 275 F.3d 1241, 1249-53 (10th Cir. 2002) (upholding Colorado PUC's authority to allow CLECs to opt-in to provisions of other CLEC's interconnection agreements and also US West's local service tariffs as part of the arbitrated interconnection agreements); *Michigan Bell Tel. Co. v. Strand*, 26 F. Supp.2d 993, 1000-01 (W.D. Mich. 1998) (upholding Michigan PSC's authority to allow CLECs to purchase transport out of either an interconnection agreement or a state tariff). *See also In re Petition of WorldCom, Inc, Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes With Verizon Virginia, Inc. and for Expedited Arbitration*, CC Docket No. 00-218, DA 02-1731, at ¶ 602 n. 201 (rel. July 17, 2002) ("*Virginia Arbitration Order*") ("We expect that whether a party may purchase a service out of a tariff when it is also offered in the interconnection agreement would depend on the language of the agreement.").

result, SBC Illinois' tariff designation is dispositive for purposes of this proceeding. *Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 55 (Ill. 2004) (stating that a tariff "*is a law*, not a contract, *and has the force and effect of a statute*").

Second, as a practical matter, SBC Illinois has executed literally hundreds of interconnection agreements with CLECs,[28] and many of these agreements either reference SBC Illinois' tariffed rates for UNEs or expressly permit CLECs to order out of SBC Illinois tariffs for UNEs and other products and services. *See e.g.*, AT&T Agreement § 1.30.2 ("The Parties agree that AT&T is not precluded from ordering products and services available under any effective SBC tariff or any tariff that SBC may file in the future provided that AT&T satisfies all conditions contained in such tariff and provided that the products and services are not already available under this Agreement."). As a result, SBC Illinois' claim that it only provides UNEs to CLECs pursuant to interconnection agreement is exaggerated.

Third, as a legal matter, Staff believes there is some strength to Joint CLECs' argument that when SBC Illinois provides UNEs to CLECs via interconnection agreement, those UNEs qualify as "telecommunications services" under Section 13-203. *See* Joint CLECs Initial Brief at 12-13, *quoting* 220 ILCS 5/13-203. As Joint CLECs correctly note, Section 13-203 defines a "telecommunications service," in pertinent part, to include "interconnection arrangements." *Id.*

In addition, Staff shares Joint CLECs' view that it is reasonable to deduce from Section 13-505.1(a)'s text and legislative purpose that the provision "encompasses UNEs provided by SBC to CLECs" because both CLECs and SBC Illinois rely upon those UNEs to provide the same competitive retail service. *Id.* at 13.

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[28] *See* Illinois Commerce Commission, Telecom Library (visited Dec. 8, 2004) http://www.icc.state.il.us/tc/library.aspx?key=SBC&key= InterConXAgree (listing SBC Illinois' interconnection agreements (and subsequent amendments) executed since year 2000).

In Staff's view, however, the above legal theory requires further development because Joint CLECs do not explain how it squares with Section 13-216's definition of "network element." Section 13-216 defines a "network element" as "a facility or equipment used in the provision of a telecommunications service." 220 ILCS 5/13-216. At first blush, the terms "network element" and "telecommunications service" may be, but not necessarily mutually exclusive. It is Staff's hope that Joint CLECs will fully articulate their position in their Reply Brief. Accordingly, Staff will not comment further on Joint CLECs' theory.

* * *

Before moving on to discuss whether UNEs are "noncompetitive service elements," Staff makes the following observations as to CUB's Initial Brief. CUB generally concurs with SBC Illinois' argument that UNEs are not "services" for imputation purposes because of the so-called "telecommunications services"/"network element" distinction. *See* CUB Initial Brief, at 8-12. CUB, however, performed no statutory construction analysis whatsoever and simply repeated the unsupported testimony of its witness, Mr. William Dunkel. As Staff has explained previously, expert testimony as to statutory interpretation is both *incompetent* and *improper* even in the administrative context. *See supra*, § II, A, 1. *citing Dept. of Corrections v. Ill. Civil Service Comm'n*, 187 Ill. App. 3d 304, 307-08 (1st Dist. 1989). As a result, Staff only discussed CUB's position above to the extent that it mirrors SBC Illinois'.

In addition, CUB makes an incorrect claim that the Commission's June *UNE Loop Order* has already predetermined that UNEs are not "services" subject to imputation. *Id.* at 8 *citing* and *quoting UNE Loop Order*, at 288. Even a cursory review of the *UNE Loop Order* reveals that the Commission was merely summarizing SBC

Illinois' position, rather than making a legal conclusion.[29] In short, CUB is clearly mistaken that the Commission's *UNE Loops Order* has predetermined the outcome in this proceeding.

CUB's discussion of the *UNE Loop Order* also demonstrates its fundamental lack of understanding of how imputation operates. The *UNE Loop Order* makes clear that "the plain language of [Section 13-505.1] [requires] imputation tests [for] *competitive services*, not the noncompetitive services that are at issue in this proceeding [i.e., the proper TELRIC rates for SBC Illinois' *unbundled loops*]." *Id.* at 288. In other words, imputation tests are required for SBC Illinois' *competitive services*, such as its retail business NALs, which is supposed to be the focus of Section II of each party's brief. The fact that UNEs are "noncompetitive services"—as even the *UNE Loop Order* describes them—has no bearing on whether UNEs constitute "noncompetitive services" or "noncompetitive service elements" for purposes of establishing SBC's imputed costs for its retail NALs under Section 13-505.1(a)(1)-(3). If anything, the Commission's statement in its *UNE Loop Order* that SBC Illinois' unbundled loops are "noncompetitive services" proves Staff's point that UNEs *are* "noncompetitive services" for imputation purposes. Staff will neither dwell nor rely on that statement because the Commission specifically declined to predetermine the matter—a point that CUB fails to grasp. With that said, Staff moves on and demonstrates below that UNEs are, at minimum, "noncompetitive service elements" for imputation purposes.

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[29] *UNE Loop Order*, at 288-89 (where the Commission stated in relevant part: "Moreover, the timeframe of this proceeding is limited and yet parties do not even agree on the proper manner to apply the [imputation] test. SBC argues that imputation tests apply only to complete services. *The services at issue [in this proceeding] are not stand alone services, meaning that they must be offered in conjunction with other services to be useful to end users.* Staff, on the other hand, argues that the UNE loop is the functional equivalent of network components contained in SBC's retail rates. We decline to decide this issue in this TELRIC proceeding.") (emphasis added to sentence quoted by CUB).

C. UNEs ARE, AT MINIMUM, "SERVICE ELEMENTS" FOR IMPUTATION PURPOSES

In addition to being "noncompetitive services," Staff's Initial Brief also explained that SBC Illinois' UNEs are "noncompetitive service elements" for purposes of Section 13-505.1. Staff Initial Brief, at 33-35. Staff determined that while the term "noncompetitive service" was interchangeable with the term "noncompetitive telecommunications service," the term "noncompetitive service elements" was ambiguous because the word "elements" was neither defined in Article XIII nor the PUA. *Id.* at 33.

Consistent with accepted rules of statutory construction, Staff then endeavored to define the word based on its ordinary meaning and in accord with Section 13-505.1 legislative purpose. *Id.* at 34. Staff deduced that the word "elements," as it is used in the term "noncompetitive service elements," refers to the constituent or distinct noncompetitive part or parts that comprise a competitive telecommunications service. *Id.* Further, Staff logically concluded (largely through common sense) that SBC Illinois' UNE Loops and Ports are "noncompetitive service elements" for imputation purposes because the record undeniably reveals that loop and ports are two inputs necessary to offer competitive business network access line service. *Id.*

SBC Illinois, however, posits that "[i]f UNEs are not 'services,' [then] they cannot be 'service elements' either." SBC Illinois Initial Brief, at 17. Yet, the company provides little more than a riddle wrapped inside an enigma to explain its position. *Id.* at 17-18.

As best as Staff can decipher it, SBC Illinois' argument derives from four confusing premises:

- Since UNEs did not exist in 1992, they cannot be considered "service elements";

- "'[S]ervice element[s]' [are] equivalent to rate element[s] within a 'service' that [are] separately priced, since rate elements *did* exist in 1992;

- SBC Illinois alone has the power to identify and "to selectively impute only certain rate elements in situations where not all rate elements within a 'service' are used by competitors"; and

- The legislature's 2001 enactment of the term "network elements" "clarifies" that "UNE are not 'service elements' within the meaning of Section 13-505.1."

SBC Illinois Initial Brief, at 17-18.

In short, SBC Illinois' position seems to be that UNEs are not "service elements" for imputation purposes because only it has the ability to identify service elements. In addition, the company appears to contend that it alone decides what "elements" CLECs need to provide a "service." From this, it seems clear that what SBC Illinois really saying is that CLECs no longer need unbundled loops and ports to compete against SBC Illinois because CLECs have resale and intermodal entry options.[30]

SBC Illinois' argument, however, snaps under its own convoluted logic for several reasons. SBC Illinois' first premise that "UNEs cannot be 'service elements' because UNEs did not exist in 1992" is easily refuted. A review of the Commission's February 1992 *Third Interim Teleport Order* shows that the Commission was very interested in establishing state interconnection policy for local exchange competition.[31]

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[30] *See* SBC Illinois Initial Brief, at 19, 21 (arguing that CLECs as of the final quarter of 2004 had purchased over 25% of unbundled loops on a stand alone basis, and provided their own switching); SBC Ex. 1.0 (Panfil Direct), at 10-11 (noting that "as of the final quarter of 2004, [the company] [purportedly] provided over 25% of its unbundled loops to CLECs on a stand-alone basis," and "customers are increasingly being served by competitive providers that use neither SBC Illinois' loops nor ports—e.g., wireless, cable telephony and VoIP."); *Id.* at 28 (stating that CLECs can use resale as a mode of entry instead of UNE-P).

[31] *In re: Investigation concerning access charges, the administration of the High Cost Fund, administration of the Illinois Small Carrier Association and other telecommunications issues*, ICC Docket No. 90-0425, 1992 Ill. PUC LEXIS 111, (Order entered Feb 5, 1992) ("*Third Interim Teleport Order*") (directing Staff to follow Illinois Bell and Teleport's Interconnection Stipulation and Agreement, which provides in part: "In adopting the foregoing interconnection policy as to Illinois Bell, the Commission should also direct Staff to conduct as part of this docket a workshop-style inquiry into issues and questions raised by interconnection and the consequences of increased local exchange competition as a result of such interconnection. Illinois Bell and/or Teleport recommend that the following issues be addressed in workshops: * * * (5) *What are the additional interconnections which are necessary and/or*

In fact, the Commission's order, *which proceeded the enactment of Section 13-505.1 by three months*, called upon Staff to investigate through workshops "the additional interconnections which are necessary and/or appropriate for the development of broad and effective local exchange services competition, such *as unbundling of local loops from other network services*[.]" *Id.* Moreover, the Commission directed Staff to issue a report on July 1, 1992, summarizing the comments of all interested parties. *Id.* In sum, contrary to SBC Illinois' assertion, the concept of unbundling did exist in 1992 even though it may have not been available to competitive carriers.

In addition, the Illinois Supreme Court has long-rejected SBC Illinois' legal theory that the scope of a statutory provision is shackled to only those circumstances present at the time when the statute became law. *See McDaniel v. Bullard*, 34 Ill. 2d 487, 491 (Ill. 1966). Put differently, the fact that unbundled loops and ports were not coined as "network elements" or "unbundled network elements" in 1992 has no bearing on whether they qualify as "service elements" under Section 13-505.1 today. The *McDaniel* Court properly instructs that the Commission must examine whether Section 13-505.1 is (1) prospective in operation, (2) phrased in terms comprehensive enough to cover UNEs, and (3) its application to UNEs would be consistent with the statute's legislative purpose. *Id.*

Without question, Section 13-505.1 meets each of the *McDaniel* Court factors. As Staff noted in its Initial Brief, since the word "element" as used in the term "noncompetitive service element" is not defined in the statute, that word must be given not only its ordinary and popularly understood meaning, but also must be construed with

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appropriate for the development of broad and effective local exchange services competition, ***such as unbundling of local loops from other network services****, number portability, central office inter-connection, and attendant financial and administrative inter-relationship as a result of such interconnections*.") (emphasis added).

reference to the purposes and objectives of the statute. Staff Initial Brief, at 30, 33; *M.S. Kind Associates, Inc. v. Mark Evan Products, Inc.*, 222 Ill. App. 3d 448, 450 (1st Dist. 1991). Staff previously identified that the word "element" is ordinarily defined as "a constituent part; a distinct part of a composite device." Staff Initial Brief, at 33. And, in the context within which the word appears, the General Assembly used the word "element" to refer to the constituent or distinct noncompetitive part or parts that comprise a competitive telecommunications service. *Id.* Moreover, in concert with Section 13-505.1's legislative objective to prevent a price squeeze of competitive carriers, it is obvious that SBC Illinois' UNE Loops and Ports are "noncompetitive service elements" for imputation purposes because the record undeniably reveals that loop and ports are two inputs necessary to offer competitive business network access line service. *Id.*

SBC Illinois' second and third premises—"service elements" are really "rate elements" and only the company can identify and "selectively impute" them—are entirely without merit. It is simply inappropriate for SBC Illinois to suggest that "service elements" are really "rate elements" when the company provides *absolutely no support for its proposition*. In addition, SBC Illinois does not even tell the Commission in any *objective sense* what constitutes a so-called "rate element." Moreover, SBC Illinois' description that it alone has the power to identify and "to selectively impute only certain rate elements in situations where not all rate elements within a 'service' are used by competitors" is unsettling. SBC Illinois Initial Brief, at 17. Put differently, what SBC Illinois seems to be saying is that the General Assembly delegated to incumbent carriers the arbitrary power to say what the law is and determine when something is a "service element" that must be imputed by the incumbent carrier. Illinois courts have

made clear that it is unconstitutional for the General Assembly to delegate lawmaking authority to a private person or group. *People v. Pollution Control Bd.*, 83 Ill. App. 3d 802, 807-08 (4th Dist. 1980). As a result, the Commission should reject SBC Illinois' interpretation because it would render the statute unconstitutional. *Northwest Airlines, Inc. v. Dept. of Revenue*, 295 Ill. App. 3d 889, 893 (1st Dist. 1998) ("an interpretation which renders a statute unconstitutional or otherwise invalid should be discarded.").

SBC Illinois' final claim that UNEs are not "service elements" because the General Assembly amended the statute by adding the definition of the term "network element" in 2001 is simply not credible. As one court explained in a similar context, "[i]t is anomalous to suggest that a section of the law can derive its meaning from a definition which *was not in existence on its effective date*." *University Hospital v. State Employment Relations Bd.*, 63 Ohio St. 3d 339, 587 N.E.2d 835 (Ohio 1992) (emphasis added). Traditional rules of statutory construction provide that later statutory amendments to a statute should be read together with the original statutory provisions left unchanged by the legislature.[32] These rules of construction demonstrate that, if anything, the Section 13-216 definition for the term "network element" must be read in harmony with the term "service elements."

In turn, SBC Illinois' reliance on the Illinois Supreme Court's decision in *People v. Shepard* is inapposite. SBC Illinois Initial Brief, at 18. In that case, the supreme court had to resolve a conflict between three Public Acts of the 86th General Assembly (86-266, 86-442, and 86-604) and one Public Act from the 87th General Assembly (87-754). 152 Ill. 2d 489, 494-98 (Ill. 1992). All four Public Acts amended two interrelated-statutes, Sections 401 and 407 of the Illinois Controlled Substances Act. *Id.* These

[32] 1A N. Singer, SUTHERLAND & STATUTORY CONSTRUCTION § 22.35, at 405-406.

sections were interrelated and addressed the same subject because Section 407 explicitly referenced Section 401. *Id.*

The issue was whether the changes made by the first two Public Acts (86-266 and 86-442) were carried forward into Public Act 87-754 even though Public Act 86-604 left them out. *Id.* at 496-98. The court explained that as general rule when multiple public acts of the *same* General Assembly conflict, the most recent of those enactments controls. *Id.* The supreme court held that the general rule did not apply because Public Act 87-754 sufficiently manifested the General Assembly's intent to carry the changes made by Public Acts 86-266 and 86-442 forward despite being left out of Public Act 86-604. *Id.* at 497. The supreme court concluded that the General Assembly's enactment of Public Act 86-604 without including the language contained in Public Acts 86-266 and 86-442 was merely a "legislative oversight" and the defendant was properly charged with a crime. *Id.* at 498.

In short, the *Shepard* Court dealt with successive legislative enactments to the *same* explicitly interrelated statutory provisions, which rendered them internally inconsistent. In contrast, there is no conflict between Section 13-505.1 and Section 13-216 of the PUA because (1) the provisions are not explicitly interrelated, (2) the General Assembly did not amend Section 13-505.1 when it added the term "network element" to Article XIII of the PUA, (3) the term is not even used in the imputation statute, and (4) the term "network element" only appears in sections unrelated to the imputation statute.[33] Thus, no conflict exists between Sections 13-216 and 13-505.1. As a result,

[33] The term "network element" only appears in Section 13-712 and 13-801 and those sections address subjects wholly-unrelated to imputation. *See* 220 ILCS 5/13-712, 13-801. In addition, Staff notes that the term is also used in Section 13-408 and 13-409. 220 ILCS 5/13-408, 13-409. In particular, Section 13-408(d) states: "*Notwithstanding anything to the contrary contained in Section 13-505.1 of this Act*, unbundled network element rates established in accordance with the provisions of this Section shall not require any increase in any retail rates for any telecommunications service." 220 ILCS 5/13-408(d)

Section 13-216 is complementary and can (and should) be read in harmony with the term "noncompetitive service element" as it appears in Section 13-505.1. *McTigue v. Personnel Bd.*, 299 Ill. App. 3d 570, 589 (1st Dist. 1998) (If two interpretations of a statute are possible, then the one that gives all words in the statute some meaning will be the one that is most reasonable.)

IV. ISSUES RELATED TO SPECIFIC TESTS

A. ISSUES COMMON TO THE PARTIES' PROPOSED IMPUTATION TESTS

1. Inclusion Of Nonrecurring Charges ("NRCs")

Staff witness Mr. Koch takes the position that NRC's should not be included in the imputation test for the business network access line because the rate for the business network access line service is not designed to recover the upfront cost of establishing the line connection. Staff IB, at 35; Staff Ex. 1.0 at 16. Mr. Koch explained that the costs associated with establishing service are recovered, not in the business network access line service, but, rather, they are recovered separately in SBC's line connection and service order charges. Id. SBC counters this position by indicating that NRCs are part of the total service revenue generated by the customer, and that carriers may choose to recover up-front costs via an NRC or over the life of the service in

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(emphasis added). In November 2003, the United States Court of Appeals for the Seventh Circuit affirmed a federal district court decision that permanently enjoined both SBC Illinois and the Commission from enforcing Sections 13-408 and 13-409 in their entirety because the provisions were unconstitutional on federal preemption grounds. *See AT&T Communs. of Ill. v. Ill. Bell. Tel. Co.*, 349 F.3d 402 (7th Cir. 2003). As a result, neither the Commission nor any party may rely upon these sections for purposes of this proceeding because the Supreme Court's seminal preemption case, *Gibbons v. Ogden*, instructs that a state statute preempted by federal law is a "nullity." 22 U.S. 1, 210-211 (1824). The term "nullity," according to Black's Law Dictionary, means "an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal effect." BLACK'S LAW DICTIONARY 963 (6th Ed. 1991). In short, a preempted statute, while it is preempted, is treated as if "it had not taken place" at all.

recurring charges. SBCI IB at 20. As such, SBC reasons that it is inappropriate to separate nonrecurring costs and revenues from recurring costs and revenues. Id.

Staff agrees with SBC that it could choose to change its rate structure so that recurring charges are designed to recover these up-front costs and, if SBC re-designed its rate structure, it would be wholly appropriate to include these costs in the imputation test for retail business NALs. As SBC indicates, whenever it files a promotional tariff that waives NRCs, a separate imputation test is filed that reflects this waiver. Id. Staff concurs with this approach in such an instance. However, the fact remains that, under SBC's current rate structure, retail business NAL rates are not designed to recover nonrecurring costs. As long as this remains the case, it would be improper for the retail business NAL imputation test to include nonrecurring cost and revenues.

2. Use Of LRSIC Or TELRIC Costs For The Port

Staff asserts that Section 13-505.1 of the PUA requires that the UNE port must be included in the imputation test. In Staff view, this is a straight-forward determination, as the port is a necessary element of the retain business NAL and it has a tariffed noncompetitive rate. If UNEs are to be considered services or service elements, this conclusion is academic. SBC, however, takes a different view. SBC makes two unpersuasive arguments as to why it believes that the port LRSIC is the more important component of imputed cost.

First, SBC contends that "[c]ost elements should be imputed only when competing providers have no choice (or almost no choice) but to obtain them from SBC Illinois." SBC IB at 21. SBC then states that because CLECs "purchased over 25% of unbundled loops on a stand-alone basis" providing "the switching themselves." Id. Based upon this presumption, SBC then concludes that the remaining roughly 75% of

CLECs "*choose* to obtain a UNE port as part of their service provisioning process []does not determine whether the rate must be imputed." Id. (emphasis in original). Staff agrees with SBC in that the cost element to be imputed should be a bottleneck facility. As a noncompetitive service, the UNE port is just that. The fact that only 25% of competitors provide their own switching is an indication that it is not economically feasible for the majority of competitors to self-provision. Section 13-209 of the PUA requires that a service must be reasonably available from more than one provider before it can be considered a competitive service. A conclusion that no feasible alternative provider exists, at least for a reasonable number of CLECs, for the UNE port is strongly supported by the fact that the UNE port remains classified as a noncompetitive element. Moreover, both Section 13-801 and TA 96 are still the law of the land and SBC is still required to provide these so called "cost elements" under its existing unbundling obligations.

SBC also contends, in opposition to Staff's position, that "the mere fact that the UNE switch port is designated as 'non-competitive' in the tariff is not determinative of the need to include the port in the imputation test." SBC IB at 21-22. As much as SBC might like to think that this is the case, a plain reading of the statute requires the imputation of these rates.[34] The only exception might be where certain essential facilities are not offered via tariff, but solely through interconnection agreements. In such a case, Staff would argue that the base rate offered to all carriers in such an agreement would be the appropriate rate to impute. Such is not the case for the UNE port, however.

[34] *See e.g., GTE North Inc.: Proposed filing to restructure and consolidate the local exchange, toll, and access tariffs with the tariffs of the former Contel of Illinois, Inc.*, ICC Docket Nos. 93-0301/94-0041 (consol.), 1994 Ill. PUC LEXIS 436, at * 161 (Final Order, October 11, 1994) (the Commission ordered GTE North to use its tariff price for local loops and acess switching services in its imputation test for the company's CentrNet service).

Second, SBC argues that that there is a "logical 'disconnect' between Staff's and the Joint CLECs' insistence that, on the one hand, usage and feature costs and revenues *may not* be included in the imputation analysis and that, on the other hand, the UNE port rate *must* be used." SBC IB at 22 (emphasis in original). Staff does not dispute that usage and features are made available with the purchase of a UNE port. However, the question at hand in this proceeding is how to impute the cost of provisioning a business NAL, and the answer is that the imputed cost must include a UNE port because it is an essential element for many carriers. Further, even though the functionality to provide usage and features is available on the UNE port, there is no guarantee that customers will purchase these services. The logic advanced by SBC presupposes that all such services will be provided to end-users.

B. ISSUE SPECIFIC TO SBC ILLINOIS' PROPOSED "BROAD" IMPUTATION TEST

1. Accuracy Of Data Used To Develop Usage, Feature And Switched Access Revenues

This is an issue primarily contested by SBC and the Joint CLECs. As Staff noted in its Initial Brief (at 39), revenue for usage and features, as a threshold matter, should not be included in the test. Id. If, however, the Commission decides that this revenue should be in the test, Staff finds the demand data used in SBC's imputation tests, which comes from their annual aggregate revenue test filing, to be an acceptable data source. Id.

The Joint CLECs identified concerns with SBC's calculation of revenues for usage, features, NRCs, and switched access. Joint CLEC IB at 20. Staff did not address any specific concerns identified by Joint CLEC witness Webber regarding these calculations. Rather, Staff merely indicates that, if the Commission were to decide that

revenue for these items to be a part of the test, then the revenue for these items should reflect any and all discounts offered by SBC. Staff IB at 40.

2. Use Of Averages To Develop Usage, Feature And Switched Access Revenues

Staff's Response to SBC

Staff and the Joint CLECs argue that no level of usage, feature, and switched access revenue is appropriate for the imputation tests at issue in this proceeding. *See generally,* Staff IB and Joint CLEC IB. Staff and the Joint CLECs further contend that, if revenues for these services are allowed in the tests, that the averages provided by SBC are excessive and are only reflective of a minority of the marketplace. Staff IB at 41-43; Joint CLEC IB at 21. SBC defends its use of averages to develop usage, feature and switched access revenues by contending that "[i]t is common practice to use averages to determine revenue levels for products and services." SBC IB at 24. While this statement may be true in the context of a general representation of its revenues, it does not specifically address the practice of applying the average revenues in an imputation test, or whether the specific averages used by SBC in this proceeding are appropriate.

SBC further defends the averages it uses by arguing that its business NALs would pass a broad imputation test even if 20% of the average revenues and costs for usage, features, and switched access were used. Id. at 24-25. In Staff's view, this statement undermines the use of these average revenues by SBC in its imputation tests, as it illustrates just how ineffective the tests become when such averages are used. This statement also fails to provide any new information. Rather, it is an alternative means of representing the same information as contained in the table on page 41 of Staff's Initial Brief. The table provided by Staff shows that there is such a

significant revenue surplus in SBC's proposed imputation tests that network access lines could be reduced to zero and still pass. Staff IB at 41. Therefore, whether one reduces the average revenue in the test by 80% or subtracts out the cost of the network access line, the conclusion is the same -- SBC passes its own proposed imputation test even when the revenue side of the test is reduced substantially. Further, this fact does not lend itself to the conclusion that SBC's proposed tests are representative of a substantial portion of SBC's business customers, as it contends. Id. at 25. SBC is not proposing to reduce these revenue figures in the test by 80% to be more representative of its customer base. As it currently stands, the revenue proposed by SBC for its tests is representative of a minority of its customer base.

SBC, moreover, contends that "Section 13-505.1 does not require that imputation tests be performed for every customer or subgroup of customers, based on their individual purchasing patterns." SBC IB at 25. While Staff finds this to be a true statement, it disagrees with the conclusion SBC attempts to draw from it. It is clear from Staff's Initial Brief and the testimony of Mr. Koch, that Staff does not propose that separate imputation tests be performed on every customer or subgroup of customers. Any implication that Staff is advocating such a position is a transparent distortion of Staff's position. Nor is it Staff's understanding that the Joint CLECs or any other party is proposing such a concept. Rather, it is Staff's understanding that an imputation test must be passed in all circumstances with no exceptions. To satisfy the statute, it is only necessary for the carrier to show that its service passes imputation under the most difficult of circumstances. For if a carrier can demonstrate that its service passes imputation under the most difficult of circumstances then logic would dictate that a service will pass imputation under all other circumstances.

SBC makes a further attempt to justify its use of average revenues by arguing that its test results would be the same whether they were expressed on an average, per-line basis or on an aggregate basis for all its customers. Id. SBC appears to be confused, as this argument only addresses whether total revenue for business NAL's, usage, features, and switched access should be divided by the total number of business NAL's or not. Staff agrees with SBC that its results would be identical whether they were averaged over the total number of lines or represented as a lump sum. SBC's statement is a foregone conclusion that adds nothing to the issue at hand, but rather appears to be an attempt to trivialize the matter. The issue to be addressed in Section IV (B)(2) of each party's Initial Brief, as Staff understands it, is whether SBC's inclusion of revenue for usage, features, and switched access is appropriate for the business NAL test, which is not a trivial matter. SBC constructed its tests in this proceeding on a per-line basis, and as such the revenue in the test was developed on a per-line basis as well. No party to this proceeding took issue with the fact that the revenue in SBC's tests was represented on a per-line basis. Rather, parties took exception to the presence of the averages for certain services in SBC's tests, which is what Section IV (B)(2) of the brief outline is intended to address.

Staff's Response to CUB

The overall strategy in CUB's Initial Brief for defending its support of SBC's use of average revenues for usage, features, and switched access services would appear to be founded on a mischaracterization of various statements allegedly made by Staff witness Mr. Koch. Mr. Koch criticized CUB witness William Dunkel's support for SBC's use of such averages in rebuttal testimony, concluding at one point that, "Implied in Mr. Dunkel's statement is that Section 13-505.1 allows for the pricing of retail services at

below imputed cost for a majority of the marketplace, so long as the difference can be made up by high volume customers." Staff Ex. 2.0 at 6. CUB does not dispute the accuracy of Mr. Koch's statement. Rather, to defend its own position, CUB claims that Staff is suggesting that "any customer utilizing the UNE loop and port facilities for more features than the [sic] only the NAL and the EUCL . . . are the 'highest volume customers.'" CUB IB at 12-13. CUB's characterization of Staff's position is indeed incorrect.

Staff's criticism of Mr. Dunkel was based solely on the fact that Mr. Dunkel fully supported SBC's use of average revenues for usage, features, and switched access in its imputation tests. Data provided by SBC shows that the average revenue used in the tests is representative of the top 34-40% of SBC's customers. Staff Ex. 1.0 at 24; Staff IB at 41-42. Mr. Koch's use of the term "high volume customers" in the above quoted statement is a direct reference to this fact. Mr. Koch is not suggesting in this statement, in any manner, that any use of the loop and port to provide services above and beyond dial tone should be considered "high volume". The fact remains, however, that Mr. Dunkel and CUB support a test whose average revenue is so high that retail business NALs would pass even if the revenue of a majority of customers did not exceed imputed costs.

CUB continues on to characterize Staff's tests as inappropriate for allegedly pigeonholing a "tiny group of fictional extreme customers." CUB IB at 12-14. In supporting the concept that imputation must be passed in all circumstances, Staff is hardly being extreme. In fact, none of Staff's positions in this proceeding can credibly be characterized as extreme in that they are entirely consistent with the findings and conclusions this Commission has reached in the past. *See supra*, §§ II and III. If any

party's positions in this proceeding could be creditably characterized as on the extreme side it would be the CUB and SBC positions as they are requesting that this Commission abandon its past precedents. Staff is merely recommending that the Commission resolve the imputation issues at issue in this proceeding consistently with how it has treated similar issues in the past.

CUB similarly misconstrues the Staff's responses to certain CUB data responses. CUB IB at 14-15. CUB's entire argument here is based upon another mischaracterization of Staff's position. CUB states that Mr. Koch "*suggests* that while the average retail business revenues per line are above the imputed costs per line, the majority of the business customers have revenues that are below the imputed costs." CUB IB at 14 (emphasis added). Mr. Koch never said any such thing or even "suggested" it. In fact, as CUB accurately quotes Mr. Koch in the following sentence (Id.), Mr. Koch states that the tests SBC and CUB support "*allows* for the pricing of retail services at below imputed cost for a majority of the marketplace." Staff Ex. 2.0 at 6-7 (emphasis added). This is the same point Mr. Koch and Staff have consistently made throughout this proceeding. See Staff Ex. 1.0 at 23; Staff Ex. 2.0 at 6-7; Staff IB at 41. Staff has repeatedly noted that because CUB's and SBC's proposed broad tests include revenues from several individually tariffed services they result in a very wide revenue surplus compared to NAL retail rates. In fact, as noted above, these margins are so wide that the access line rates could be reduced to zero and still pass an imputation test. Staff Ex. 1.0 at 23; Staff Ex. 2.0 at Staff IB at 41.

CUB, following its mischaracterization of Staff's position, then uses Staff's data responses to CUB DR 1.01 in a transparently futile attempt to discredit Staff by alleging that Staff's responses to CUB DR 1.01 are inconsistent with Mr. Koch's prior testimony.

Staff's responses to CUB DR 1.01, however, are entirely consistent with Mr. Koch's testimony. They are, however, inconsistent with CUB's mischaracterization of Mr. Koch's testimony. For instance, after CUB mischaracterizes Mr. Koch's testimony, it claims that "However, [sic] However, in response to data requests, Mr. Koch acknowledged that it is not his testimony that the majority of business customers have averaged business revenues that are less than the imputed cost." CUB Initial Brief at 15 (emphasis in original). It is not Mr. Koch's testimony that the majority of business customers have averaged business revenues that are less than the imputed cost; it is Mr. Koch's testimony, however, that the tests CUB and SBC support *allow* such a result. Like CUB's labeling of Staff's position as "extreme," CUB's argument here that Mr. Koch "suggests" something he, in fact, does not, appears to be designed to confuse the Commission and obfuscate the paucity of CUB's entire position in this proceeding. Resorting to such transparent subterfuge should only serve to undermine CUBs position and, in turn, support Staff's positions in this proceeding.

V. RATE DESIGN ISSUES FOR BUSINESS SERVICES GENERALLY

As an initial matter, the Staff reaffirms its commitment to the proposition that "[t]he Commission can (and should) … quite properly place the onus upon SBC to find an appropriate solution [to the imputation problem]." Staff IB at 45. First, the Commission has done precisely this in the past. Id. Second, neither Section 13-505.1 nor the Commission's Rules require more than this. Third, SBC's Petition in this proceeding may foreclose other options.

SBC filed a *Petition* in this proceeding seeking, *inter alia*, a Commission Order concluding that "[SBC's] standard retail access lines rates and ISDN rates satisfy the requirements of Section 13-505.1, and provide [SBC] with direction with respect to

COPTS rates." SBC Petition at 4. In other words, SBC has *not* requested that the Commission's Order in this proceeding address rate design questions other than those associated with COPTS rates.

This is significant, since the courts have found in several cases that the Commission cannot grant relief that a petitioner or complainant does not request. Peoples Gas v. Commerce Comm'n, 221 Ill. App.3d 1053, 1059; 583 N.E.2d 68, 71; 164 Ill. Dec. 514; 1991 Ill. App. Lexis 1906 at 12 (1st Dist. 1991); City of Champaign v. Commerce Comm'n, 141 Ill. App.3d 457, 461; 490 N.E.2d 119, 122; 95 Ill. Dec. 646; 1986 Ill. App. Lexis 1929 at 8-10 (4th Dist. 1986). The Commission recognizes this proposition, in which SBC appears to concur fully. *See Order* at 29, Illinois Commerce Commission On Its Own Motion -vs- Illinois Bell Telephone Company: Investigation of the propriety of the rates, terms, and conditions related to the provision of the Basic COPTS Port and the COPTS-Coin Line Port, ICC Docket No. 01-0609, 2003 Ill. PUC Lexis 821 at 75-76 (October 22, 2003)(" We begin first by [agreeing] with SBC that the scope of this docket is indeed limited by the Petitions filed by Data Net Systems, LLC, TruComm Corporation, and Payphone Services, Inc. and the Commission's Initiating Order"). Accordingly, the Commission may not be in a position to direct a specific rate design here.

That said, the parties have made a number of rate design proposals. As noted above, the Staff has addressed certain of these proposals at some length in its *Initial Brief*. *See* Staff IB at 46-49. Nonetheless, some discussion of these proposals is warranted.

SBC notes the existence of a number of rate design options, chiefly in support of its assertions that none other than raising business NAL rates are reasonable or

workable. *See* SBC IB at 25, *et seq*. SBC first states that it has no intention of reducing its UNE loop rates, SBC IB at 26, thereby effectively removing this option from consideration. SBC further argues that it should not be required to discontinue providing the business NAL on a stand-alone basis, since it contends that its customers want to purchase this service. Id.

SBC contends that the increases in the business NAL rate required to satisfy the imputation requirement would be "relatively modest" and "reasonable in the marketplace". SBC IB at 27. SBC prefers this alternative to what it refers to as "revenue neutral" solutions, which is the term it uses to describe rate design alternatives that include the business NAL, and some combination of usage, vertical services, and other features. Id. at 27, *et seq*. SBC appears to consider these options essentially anti-competitive, or at least unnecessary to promote competition. Id. at 28-29. In raising these points, SBC attempts to rehabilitate its contention that its so called "broad" imputation test is proper, by asserting that CLECs can compete for low-margin customers, simply by using high-margin customers to subsidize them. Id. Staff has already pointed out the defects in the latter argument. However, the Staff notes that SBC's proposal to increase the business NAL rate is lawful. Staff IB at 49.

As Staff noted in its Initial Brief, *see* Staff IB at 49-52, the prospective solutions for the failure of SBC's business NAL to satisfy imputation must be considered in the rate cap for services provide to small business customers in Section 13-502.5 of the Act, which caps such rates at their May 1, 2001 levels through July 1, 2005. Thus, implementation of some of the rate design options floated in this proceeding will be difficult. SBC raises precisely such contentions, suggesting that its billing systems would have to be extensively revamped to differentiate between customers subject to, or not

subject to, the four or fewer access line rate cap. SBC IB at 25-31; SBC Ex. 1.0 at 30-32. SBC accordingly suggests deferring any rate changes to July 1, 2005. Id.

As Staff noted in its Initial Brief, the Commission should decline to do so. The General Assembly enacted Section 13-502.5 3 ½ years ago; accordingly, although SBC has had ample time to accommodate its billing systems to the existence of a legally mandated class of small business customers, it apparently has not done so. Its failure to do so cannot now serve as a basis for permitting it to violate imputation. Deferring resolution of this issue prejudices the CLECs that are placed at a competitive disadvantage for a period of something like half a year.

The Section 13-502.5 rate cap provision is not as much in conflict with the statutorily mandated imputation requirements as it simply limits the options available to SBC in finding a solution. SBC's failure to implement billing systems capable of differentiating between two legally mandated classes of business customers further hinders this effort. SBC is barred from raising the retail rates that it charges business customers with 4 or fewer access lines until July 1, 2005. By extension, because SBC's billing system is not able to distinguish between customers, this further calls into question SBC's ability to implement any sort of retail rate increase without violating the 13-502.5 rate cap. It appears that SBC is not in a position, based on its own testimony, to increase stand-alone business NAL rates, since it is unable to distinguish between customers with four or fewer access lines, and those with five or more, and therefore unable to ensure that stand-alone business NAL rates will not increase for the former group. However, this problem is SBC's to solve; the Commission need only determine that SBC has not satisfied imputation.

The Joint CLECs state that they do "not recommend[] that the Commission direct SBC to, for example, raise specific retail business rates or reduce specific UNE prices or other wholesale service prices to achieve compliance [with imputation.]" Joint CLEC IB at 25. Indeed, the Joint CLECs do not recommend that the Commission direct SBC to take any specific step. Id. It is the Joint CLECs' position that "SBC should be responsible for developing and implementing an overall plan to achieve compliance with imputation requirements[.]" Id.

The Joint CLECs nonetheless propose four options that SBC might utilize to pass imputation. *See* Joint CLEC IB at 25-35. Specifically, the Joint CLECs observe that, to comply with imputation, SBC might: (1) voluntarily reduce UNE loop rates, Joint CLEC IB at 26-31; (2) provide credits to CLECs in the amount by which SBC's UNE loop rates fail imputation, Joint CLEC IB at 31-32; (3) withdraw those services that fail imputation, Joint CLEC IB at 32-34; or (4) raise retail business NAL rates. Joint CLEC IB at 34-35.

It should be noted that the Joint CLECs' first option, a reduction in UNE loop rates, appears to have been overtaken by events. As the Joint CLECs and Staff both observed in their respective Initial Briefs, SBC would have to do this of its own volition. Joint CLEC IB at 29; Staff IB at 47, and n.42. It is now clear, to the extent that it ever was *unclear*, that SBC has no intention of undertaking this course. *See* SBC IB at 26 ("SBC Illinois is not willing to reduce its UNE loop rates on a voluntary basis"). Accordingly, further consideration of this option appears unwarranted.

The Joint CLECs appear to conclude that, whatever steps SBC takes to bring its retail business NAL rates into compliance with imputation, it should do so very promptly indeed. The Joint CLECs recommend that the Commission order SBC to file a "report and plan of action" that describes how SBC proposes to comply with imputation,

accompanied by new imputation studies, no later than 21 days after the Commission enters its Order in this proceeding. Joint CLEC IB at 24. Further, the Joint CLECs aver, SBC should be required to implement its recommended solutions within 35 days of the Commission Order. Id.

The Department of Defense and other Federal Executive Agencies (hereafter "DOD/FEA") is, in essence, the federal government, and, as such, it uses, and therefore purchases, an extraordinarily large volume of telecommunications services in Illinois (as presumably elsewhere). DOD/FEA IB at 2. The DOD/FEA therefore asserts that it is likely to be significantly affected by whatever the Commission ultimately orders in this proceeding. Id. The DOD/FEA recommends that the Commission order SBC to "make the minimum necessary increases in the retail line charges for Access Areas B and C, with compensating reductions in the charges for other services to business end users, so that the impact on business users [is] revenue neutral overall." DOD/FEA IB at 2-3. To the extent that the Commission is inclined to adopt any of the options proposed by the Staff, DOD/FEA advocates adoption of the third, or "make-whole" realignment. Id. at 6. DOD/FEA opposes, as "too amorphous", the proposal that SBC be required to resolve the imputation problem itself, unless the Commission gives "additional clarification", or imposes "more constraints" upon SBC. Id. at 4.

While the Staff is sympathetic to DOD/FEA's position in this proceeding – DOD/FEA appears to be the entity that has the most at stake as a result of any order the Commission enters – the fact remains that the scope of the SBC petition, the statute, the rules, and prior Commission decisions all militate against the Commission

doing anything in this proceeding but finding that SBC's business NAL rate does not pass imputation, and directing SBC to fix the problem.

The Citizens Utility Board (hereafter "CUB") does not take a position on rate design. CUB IB at 15.

As noted above, and in its *Initial Brief*, *see* Staff IB at 45, the Staff recommends that the Commission (1) find that SBC's business NAL rate fails to satisfy imputation; and (2) direct SBC to file rates in whatever form that satisfy imputation.

The Staff is uncertain regarding whether the Joint CLECs' rather stringent timetables for compliance can reasonably be met. Staff recommends that the Commission order SBC to comply within 45 days of the final Order in this proceeding.

VI. PAYPHONE ISSUES

The Illinois Public Telecommunications Association (hereafter "IPTA") argues that COPTS rates the Commission set for SBC in the *Payphone Order*, *see Interim Order*, Illinois Commerce Commission On its Own Motion: Investigation Into Certain Payphone Issues as Directed in Docket 97-0225, ICC Docket No. 98-0195 (November 12, 2003) (hereafter "Payphone Order"), are "conclusively established", IPTA IB at 5, are "the only permissible rates[,]" Id. at 15, "must be applied to network services provided to payphone providers[,]" Id., and cannot be linked or compared to retail business rates. Id. at 5-6. IPTA's position is based upon the position – undeniably true – that "[i]t is beyond per adventure [sic] that network access rates to payphone providers must be cost based in compliance with the New Services Test." IPTA IB at 15. This uncontroversial assertion is virtually the only correct one that IPTA makes, however.

IPTA appears to contend that any alteration in this proceeding, or indeed resulting from this proceeding, of the rates set in the *Payphone Order* is (1) preempted by Section 276(c) of the federal Telecommunications Act of 1996; (2) the equivalent of an improper collateral attack upon the *Payphone Order*; and (3) in any case, unsupported by substantial evidence. IPTA IB at 8-10, 13-14. These assertions are incorrect.

The Staff dealt extensively with the alleged preemption question in its Initial Brief, *see* Staff IB at 56-63, and accordingly will not recapitulate such arguments at length here. However, one of IPTA's arguments is sufficiently inexplicable to warrant examination.

IPTA takes the curious position that:

> The Commission has determined [proper COPTS] rates in Docket No. 98-0195 [the Payphone Order]. Application of state regulatory requirements establishing a different basis for those rates have [sic] been expressly preempted by the FCC.
>
> IPTA IB at 5

Thus, IPTA appears to argue that, to the extent that application of the imputation requirement requires any *change* in existing COPTS rates, its application is therefore preempted. IPTA IB at 5, 14-15.

If the Staff correctly interprets this rather opaque contention, the IPTA is arguing that, where the Commission has adopted Section 276-compliant COPTS rates, Section 276 preempts adoption of Section 276-compliant COPTS rates in *other subsequent* proceedings based on changed costs. This simply cannot be true; it is tantamount to arguing that cost-based rates do not change as costs change, which would, of course, render the term "cost-based" meaningless, presumably an outcome IPTA would find deplorable.

Further, as Staff noted in its *Initial Brief*, it is not the case that Section 276 preempts imputation; the imputation requirement and FCC rules adopted under Section 276 can, and readily do, coexist. Section 276 requires payphone rates that are non-discriminatory, cost based, and that do not subsidize other ILEC operations. 47 U.S.C. §276(a); *Order On Reconsideration,* ¶163, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 / Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, FCC No. 96-439, CC Docket Nos. 96-128, 91-35, and 96-439, 11 FCC Rcd 21233; 1996 FCC Lexis 6257; 5 Comm. Reg. (P & F) 321 (November 8, 1996) (hereafter, "FCC Payphone Order on Reconsideration"); Staff IB at 56, *et seq*. It stands to reason that, since these are the requirements, Section 276 preempts only those state requirements that mandate COPTS rates that are discriminatory, not cost based, or that subsidize ILEC operations. *See* Staff IB at 60-61 ("Section 276 preempts … any state law, regulation or rule that mandates payphone rates which (1) are discriminatory; (2) are not cost-based; or (3) subsidize the ILEC's own payphone service"). It follows from this that a reevaluation of payphone rates, based on new cost information, and conducted according to the methodology established by the Commission in its *Payphone Order*, would very clearly *not* constitute a state requirement inconsistent with Section 276; indeed, as noted above, the FCC has found that Section 276 requires "cost-based rates". FCC Payphone Order On Reconsideration, ¶163. Thus, it cannot be argued that a state law requiring rates to be cost based – as imputation does – could possibly constitute a "State requirement[] … inconsistent with the [FCC]'s regulations" in violation of Section 276(c); it appears to the

Staff that imputation is a state requirement *absolutely consistent* with FCC rules promulgated under Section 276.

Indeed the Commission found that the imputation test is a necessary tool so that an ILEC's COPTS does not subsidize its other operations. *See* Payphone Order at 7 ("The [imputation] test is intended to guard against cross-subsidization of competitive services by non-competitive services"). IPTA cannot, and does not, dispute this. Accordingly, the Commission should dismiss out of hand IPTA's arguments regarding the application of the imputation test to COPTS rates.

IPTA next argues that the application of an imputation requirement constitutes an improper collateral attack on the Commission's *Payphone Order*. IPTA IB at 7-13. This line of argument is chiefly directed at SBC, but certain aspects of it warrant discussion by Staff.

As the Staff noted in its *Initial Brief*, the Commission adopted, in its *Payphone Order*, a methodology whereby COPTS rates will be set going forward. Staff IB at 62. It further adopted proper rates based on then-existing cost information. Id. Requiring such rates to satisfy imputation – as required by state law – does not constitute a collateral attack on this methodology. Instead, it is nothing more than recognition of the changed cost basis of these rates. Indeed, as the Staff demonstrated in its *Initial Brief*, SBC can file COPTS rates that satisfy imputation by the very simple and straightforward expedient of: (1) developing updated LRSIC costs, modeled by the LoopCAT model, which the Commission approved in the *UNE Loop Order*; and (2) applying the revised UNE overhead loading to those costs, thereby yielding a rate. Staff IB at 63. This methodology is precisely the one the Commission prescribed in its *Payphone Order*. Payphone Order at 37.

IPTA utterly fails to appreciate that the Commission did not, in the *Payphone Order*, set COPTS rates that SBC is required to charge from now until the last trumpet is sounded. In the *Payphone Proceeding*, the Commission evaluated the methodology by which SBC set its COPTS rates, for the purpose of determining whether that methodology satisfied Section 276 and associated FCC rules. The Commission directed the adoption of a methodology, not the adoption of specific rates, just as the FCC rules require state Commissions to evaluate ILEC COPTS rates based on whether those rates were derived using an acceptable methodology, rather that whether the rates were too high compared to some arbitrary benchmark. Accordingly, IPTA's assertion that application of the imputation requirement constitutes an improper collateral attack upon the *Payphone Order* must be rejected. It is no such thing.

IPTA further argues, in a somewhat related vein, that evidence has not been adduced in this proceeding such as would warrant revision of COPTS rates. IPTA IB at 5, *et seq*. IPTA contends that "any changes to [COPTS] rates [based] on the completely [sic] dearth of evidence in the instant docket would be arbitrary and capricious." Id. at 5. IPTA asserts that "[t]he Docket No. 98-0195 proceedings [upon which the Commission based the Payphone Order] involved scores of testimonies filed in two complete sets of hearings." Id. at 6. Accordingly, IPTA contends that the matter of COPTS rates ought not to be revisited here.

There is one very significant flaw in this theory. Specifically, it assumes that there is somehow no evidentiary support for increased costs. This assertion, however, is incorrect, and in fact incorrect to an extreme degree.

IPTA was a party to the *UNE Loop Proceeding*. Accordingly, it is, or should be, aware of the fact that the Commission set SBC's UNE loop rates after a vigorously

contested proceeding in which numerous parties participated, a very large number of witnesses offered testimony[35], and a considerable volume of additional evidence was adduced. *See, generally* UNE Loop Order. The evidence adduced in that proceeding is what is being considered here. The Commission authorized SBC to increase UNE loop rates, based upon SBC's assertion (concurred in, to a modest extent by the Staff) that SBC's costs of providing UNE loops increased since last being set. The UNE loop rates thus set – supported by a significant, not to say excruciating, amount of evidence – are now the basis for imputation tests in this proceeding. It is therefore quite impossible to thus suggest, as the IPTA does, that the UNE loop rates at issue here were somehow the subject of a lesser degree of evidentiary presentation and Commission deliberation than the COPTS rates set in compliance with the *Payphone Order*.

Accordingly, the UNE loop costs used in this proceeding rest upon a strong evidentiary basis. IPTA cannot be heard to assert that the Commission would be acting in an arbitrary and capricious manner were it to require SBC to file new COPTS rates based on the costs developed in the UNE Loop proceeding.

SBC's position is markedly clearer, and consistent with Staff's to some extent. As SBC notes, correctly, in *its Initial Brief*:

> SBC Illinois agrees with the IPTA that the *methodologies* prescribed by the FCC in its payphone orders are preemptive. However, that does not mean that the *specific rates* established by the Commission in [the *Payphone Order*] are locked in concrete. … [T]he FCC provided state commissions with a choice of methodologies that could be used to develop payphone line rates. This applies to *both* the direct cost basis for developing the rates and to the methodology used to develop contribution (or overhead) loadings. With respect to direct costs, the FCC only mandates use of a forward-looking cost methodology.
>
> SBC IB at 34

[35] Indeed, "scores" of witnesses (and in any case, well in excess of twenty) offered testimony; in contrast, despite IPTA's hyperbolic assertions, it offered the testimony of *three* witnesses in the *Payphone Proceeding*.

This constitutes an entirely fair characterization of the state of the law. COPTS rates are not, as the IPTA would have the Commission believe, "locked in concrete".

SBC departs from the Staff's position, and in fact from the *Payphone Order*, however, in its proposal that the "the direct cost basis for the [COPTS] rates be revisited." SBC IB at 35. SBC contends that:

> Although the Commission approved a LRSIC-based methodology, this was not heavily litigated and most of the parties devoted little attention to the issue. At the time the record was developed in Docket No. 98-0195, there was not a significant difference between LRSIC and TELRIC loop costs; as a result of Docket No. 98-0195, LRSIC loop costs are now substantially lower than TELRIC loop costs. [fn] If current TELRIC loop costs are substituted for LRSIC loop costs in the payphone access line rate development, the differential between what CLECs pay and what payphone providers pay for similar services would largely disappear and an imputation test could be satisfied.
>
> SBC IB at 35-36 (footnote omitted)

This, while generally accurate, is not particularly enlightening. While SBC is correct in asserting that "the Commission[-]approved … LRSIC-based methodology … was not heavily litigated[,]" SBC IB at 35-35, this was chiefly because SBC filed a LRSIC study in support of its proposed rates, presumably because the LRSIC for the COPTS service was higher than (although not markedly different from) the TELRIC for the access line.

The fact remains that the Commission ordered the use of LRSIC in its *Payphone Order*. Payphone Order at 37. SBC's proposal to use TELRIC is therefore inconsistent with the *Payphone Order*. Moreover, SBC can presumably develop LRSIC studies for COPTS using its LoopCAT model, use of which, as noted above, the Commission has approved. Accordingly, the Staff is uncertain why SBC would wish to use TELRIC (as

LRSIC is likely to be higher, at least to the extent developed using LoopCAT), other than ease of implementation.

Neither the Citizens Utility Board, the DOD/FEA, nor the Joint CLECs addressed payphone issues.

The Staff remains convinced, and continues to recommend, that there is no federal preemption issue here, that COPTS rates must pass imputation, that there is no impediment to the Commission ordering SBC to file revised LRSIC studies (modeled using LoopCAT) and using the new UNE Shared and Common Cost markup with new COPTS tariffs such as satisfy imputation.

VII. CONCLUSION

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

/s/_____

Matthew L. Harvey
Eric M. Madiar
Michael J. Lannon
Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
312 / 793-2877

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Counsel for the Staff of the
Illinois Commerce Commission